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IMPLICATIONS OF DNA TECHNOLOGY ON POSTHUMOUS PATERNITY DETERMINATION: DECIDING THE FACTS WHEN DADDY CAN'T GIVE HIS OPINION

*Paternity practice has suffered from the old saw to the effect that "maternity is a matter of fact whereas paternity is a matter of opinion."*¹

In twelfth-century Japan, a person claiming to be an heir of the deceased pricked his or her finger and caused a drop of blood to drip on the deceased's skeleton.² Paternity was established if the bones absorbed the blood.³ If the putative father was still alive, the parties combined drops of their blood in a basin and paternity was established if the drops merged.⁴ Folklore such as this, and other primitive methods used until the early part of this century, were fifty percent accurate, at best.⁵ Increasingly sophisticated scientific tests developed during the last few decades, however, have raised the probability of excluding a falsely accused man to over ninety percent, greatly reducing the risk of undetected fraudulent claims.⁶

Modern scientific paternity tests examine putative fathers for the genetic traits required of the biological father.⁷ If a candidate lacks genetic traits that must be present in the child's biological father, he is absolutely excluded from paternity.⁸ The presence of identical traits in both child and putative father is not, however, absolute proof of paternity, because each of the tested traits occurs in a large subgroup of the population.⁹ Thus, a "paternity index" is calculated using knowl-

¹ HARRY D. KRAUSE, FAMILY LAW 934 (3d ed. 1990).

² *Scientific Testing for Paternity Establishment*, in BRINGING AND DEFENDING CONTESTED PATERNITY CASES: PRACTICING UNDER G.L. CHAPTER 209C 91 (Mass. Cont. Legal Educ. ed., 1989).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Steven R. Lake & Mary D. Paulsen, *From Here to Paternity*, FAM. ADVOC. 40, 41-42 (Summer 1985).

⁸ *Id.* at 42.

⁹ See *infra* notes 88-89 and accompanying text for a discussion of why identical traits do not necessarily prove paternity.

edge of how frequently different traits occur in the general population, and the use of probability statistics.¹⁰ This is a measure of the probability that the alleged father, rather than a randomly selected male, is the child's biological father.¹¹

Early scientific paternity testing examined blood samples for characteristics such as blood group and enzyme types caused by an individual's underlying genetic traits.¹² These methods cannot be used to determine the veracity of posthumous paternity claims because blood is discarded during embalming and is therefore unavailable for tests.¹³ The recently introduced deoxyribonucleic acid ("DNA") tests go beyond measuring characteristics present in a person's blood to examine the DNA molecules that contain the codes for all of an individual's physical traits.¹⁴ Because DNA is present in almost all human cells and may remain unchanged long after an individual's death, this new technology creates the promise of accurate paternity determination long after a putative father is dead and buried.¹⁵ DNA testing often produces paternity indices well above 99.99%—as near to an absolute determination of paternity as is possible.¹⁶

Courts considering paternity claims generally are concerned with problems of proof and the risk of fraudulent claims.¹⁷ Consequently,

¹⁰ Lake & Paulson, *supra* note 7, at 42–43.

¹¹ *Id.* at 42.

¹² See *Scientific Testing*, *supra* note 2, at 92–93.

¹³ Telephone Interview with Jennifer Mihalovich, Forensic Science Associates (Jan. 22, 1993).

¹⁴ NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 1 (1992).

¹⁵ Telephone Interview with Dr. Michael Baird, Lifecodes Corporation (Jan. 22, 1993); PAUL C. GIANNELLI & EDWARD J. IMWINKELRIED, SCIENTIFIC EVIDENCE 113 (Michie Supp. 1992). For example, in April 1992, the press reported that British scientists had identified the body of a man who had drowned and been buried in Brazil, in 1979, as that of Waffen-SS officer Josef Mengele. Steve Connor & Michael Sheridan, *British Scientists End the Long Search for Josef Mengele*, THE INDEPENDENT, Apr. 5, 1992, at 10. The scientists identified the body by a comparison of deoxyribonucleic acid ("DNA") found in a few slivers of bone from the exhumed skeleton and blood samples from Mengele's wife and only living son. *Id.* In addition to tissue samples from an exhumed body, DNA testing may be performed on samples taken during biopsy or autopsy procedures, or from living blood relatives of the deceased. Telephone Interview with Jennifer Mihalovich, Forensic Science Associates (Jan. 22, 1993); see *infra* notes 114–18 and accompanying text for a discussion of various sources that may be used for DNA testing.

¹⁶ See CELLMARK DIAGNOSTICS, DNA FINGERPRINTINGSM AND DNA PROFILING 8 (1989).

¹⁷ See, e.g., *Lalli v. Lalli*, 439 U.S. 259, 271 (1978) ("[b]ecause of particular problems of proof [with posthumous paternity claims], spurious claims may be difficult to expose"); *Trimble v. Gordon*, 430 U.S. 762, 771 (1977) ("the lurking problems with respect to proof of paternity"); *In re Estate of Greenwood*, 587 A.2d 749, 755 (Pa. Super. Ct.) ("proof problems have always been on forefront of counseling against condoning an illegitimate's claim"), *appeal denied*, 600 A.2d 953, *appeal denied sub nom.* *Petition of Greenwood*, 600 A.2d 954 (Pa. 1991).

courts have restricted the ability of illegitimate children¹⁸ to bring paternity suits, especially after the death of the alleged father.¹⁹ This Note argues that advances in DNA testing technology render obsolete many traditional fears regarding posthumous paternity testing, thereby removing the underpinnings of most related legislation and court decisions. Section I discusses the rights of illegitimate children to establish paternity so as to inherit and to receive benefits under various government programs.²⁰ Section II explores the potential of DNA testing.²¹ Section III discusses recent cases involving DNA testing in posthumous paternity disputes.²² Section IV discusses the legal implications of this new ability to make accurate posthumous paternity determinations, and proposes changes to the Uniform Parentage Act and Uniform Act on Paternity to reflect the new reality.²³

¹⁸The ways in which society refers to those born out of wedlock have changed significantly over time, reflecting society's evolving attitudes toward such children. See *Greenwood*, 587 A.2d at 751 n.1. Under common law, children born out of wedlock were "bastards" and suits against putative fathers to obtain support, if allowed, were called "bastardy proceedings." BLACK'S LAW DICTIONARY 152 (6th ed. 1990). Later, the term "illegitimate children" was used to refer to those born out of wedlock. *Id.* at 747-48. This was subsequently replaced with "children born out of wedlock." *Greenwood*, 587 A.2d at 751 n.1. Today, the less pejorative phrase "children without presumed biological fathers" is the preferred reference to those born out of wedlock. Interview with Gerald Beyer, Visiting Professor, Boston College Law School, in Newton, Mass. (Apr. 13, 1993). It reflects the fact that, absent marriage, there is no individual who is presumed to have fathered a child. *Id.* Several uniform acts no longer make any distinction between "legitimate" and "illegitimate children," focusing instead on the parent and child relationship. See, e.g., UNIFORM PROBATE CODE § 2-114 (1991) ("an individual is the child of his [or her] natural parents, regardless of their marital status"). Despite the move toward a more neutral term, however, most statutes and courts still use the phrase "illegitimate children." This Note uses the term "illegitimate" for consistency with the laws and cases discussed.

¹⁹English common law courts refused to hear paternity claims, because an illegitimate child lacked the right to bring such an action, even while his or her alleged father was living. See 1 WILLIAM BLACKSTONE, COMMENTARIES *459. As the law changed, reflecting society's evolving attitude toward illegitimate children, other concerns continued to inhibit courts from considering paternity claims after the putative father's death. See, e.g., *Lalli*, 439 U.S. at 267, 268, 275-76 (state requirement of filiation decree as only way of establishing paternity justified by particular problems of proof after putative father's death); *Alexander v. Alexander*, 537 N.E.2d 1310, 1314 (Franklin County, Ohio C.P. 1988), *dismissed as moot*, 560 N.E.2d 1337, 1339 (Ohio Ct. App. 1989) ("[M]ost case law, as well as statutes, provided that inheritance by an illegitimate child from his [or her] father could only be effected if the father publicly acknowledged that he was in fact the father of the illegitimate child.").

²⁰See *infra* notes 24-79 and accompanying text.

²¹See *infra* notes 80-119 and accompanying text.

²²See *infra* notes 120-287 and accompanying text.

²³See *infra* notes 288-352 and accompanying text.

I. RIGHTS OF ILLEGITIMATE CHILDREN TO INHERITANCE AND BENEFITS BASED ON PARENTAL STATUS

[I]llegitimate children are not "nonpersons." They are humans, live, and have their being.²⁴

Under English common law, an illegitimate child was *filius nullius*, the child of no one.²⁵ The child could not inherit from anyone, nor could the child have heirs other than those of his or her own body.²⁶ Moreover, an illegitimate child had no right to support from his or her parents and even subsequent marriage by the parents could not render the child legitimate.²⁷

Although these common law rules were at first carried over to the United States, by the early 1900s most states allowed an illegitimate child to inherit from his or her mother by intestate succession.²⁸ Many states, however, continued to impose restrictions on the child's right to inherit by intestate succession through the mother, from her relatives.²⁹ Moreover, most states did not allow the illegitimate child to inherit by intestate succession from or through his or her father.³⁰

Today, an illegitimate child who establishes his or her father's paternity is entitled to rights similar to those of children born in wedlock.³¹ For example, the child may be entitled to some level of support from the father.³² In addition, if the father is deceased, the child may have the right to intestate paternal inheritance depending

²⁴ *Levy v. Louisiana*, 391 U.S. 68, 70 (1967).

²⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *459. "[H]e cannot be heir to any one, neither can he have heirs, but of his own body; for, being *nullius filius*. . . ." *Id.*

²⁶ *Id.* "[H]e is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived." *Id.*

²⁷ *Id.* at *455-56, 459.

²⁸ *Alexander v. Alexander*, 537 N.E.2d 1310, 1312 (Franklin County, Ohio C.P. 1988); Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337, 337 (1962).

²⁹ See *Rights of Illegitimates*, *supra* note 28, at 337.

³⁰ *Id.* A broader exception to the rule of *filius nullius* was found in Connecticut, which allowed an illegitimate child to inherit from both of his or her parents. See *Heath v. White*, 5 Conn. 228, 233-34 (1824). By the early 1960s, a minority of states allowed an illegitimate child to inherit by or through his or her father, but almost all of these had statutes requiring a prior written acknowledgment of the child by the father. *Rights of Illegitimates*, *supra* note 28, at 337.

³¹ See Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 478-82 (1967). Modern statutes still disfavoring illegitimate children fall into five categories: support; inheritance; custody, visitation and adoption; father's name; and state and federal welfare laws. *Id.* at 477-80. This Note does not discuss support, custody, visitation or adoption restrictions, as these are immaterial once the father dies. Nor is the right to use the father's name discussed, as advances in DNA technology do not affect this issue.

³² See Krause, *supra* note 31, at 478. Most states make the father responsible for the support

upon the laws of the state in which the father lived.³³ The child also may qualify as a member of the beneficiary class if the father's will leaves property to his "children" and may qualify as a pretermitted heir if he or she is not mentioned in the father's will.³⁴

An illegitimate child also may qualify for benefits under state and federal welfare statutes that tie a child's eligibility to the existence of a father covered by the legislation in question.³⁵ Federal statutes use several methods to determine the benefit rights of illegitimate children.³⁶ For example, statutes may contain explicit provisions defining the conditions under which illegitimate children receive benefits.³⁷ These conditions may include an allowance for paternity determination after the father's death, although others require the father's acknowledgment of the child.³⁸ Rather than make explicit provisions, at least one statute, the Social Security Act, defers to state law by defining "natural child" according to "such law as would be applied in determining the devolution of intestate personal property by the courts

of his illegitimate children. *Id.* The level of support is often left to the court's discretion, and legitimate children may receive higher levels of support, for longer durations. *Id.*

³³ See Note, *The Inheritance Rights of Illegitimate Children in Georgia: The Role of a Judicial Determination of Paternity*, 16 GA. L. REV. 170, 186-88 & nn.114-18 (1981); see, e.g., COLO. REV. STAT. § 15-11-109(b)(II) (1987) (inheritance by illegitimate child allowed where paternity proven by a preponderance of the evidence); DEL. CODE ANN. tit. 12, § 508(2)(b) (1987) (same); N.M. STAT. ANN. § 45-2-109 (Michie 1989) (same); cf. ILL. ANN. STAT. ch. 110 1/2, para. 2-2(h) (Smith-Hurd Supp. 1992) (inheritance by illegitimate child requires acknowledgment, adjudication of paternity, or clear and convincing evidence of paternity); NEB. REV. STAT. § 30-2309(2)(ii) (1989) (inheritance by illegitimate child requires adjudication before father's death or strict, clear and convincing proof of paternity).

³⁴ A class gift is the gift of an aggregate sum to a body of persons possibly uncertain in number at the time of the gift, to be ascertained at a future time, who all take shares dependent upon the ultimate number of class members. BLACK'S LAW DICTIONARY 249 (6th ed. 1990). A pretermitted child is one the testator unintentionally fails to mention in his will, who is either living on the date of will execution or born thereafter. *Id.* at 1187. State pretermittance statutes commonly provide that such a child takes the same share of the estate which he or she would have taken if the testator had died intestate. *Id.*

³⁵ Krause, *supra* note 31, at 480. See *infra* notes 36-40 and accompanying text for a discussion of the eligibility of illegitimate children under federal welfare statutes.

³⁶ See generally *Rights of Illegitimates*, *supra* note 28, at 339-53.

³⁷ See *id.* at 339-40.

³⁸ For example, "child" is defined by the Longshore and Harbor Workers' Compensation Act to include an "acknowledged illegitimate child dependent upon the deceased." 33 U.S.C. § 902(14) (1988). Thus, an unacknowledged child bringing a claim after the putative father's death is deprived of two reliable sources of evidence: the father's testimony and scientific paternity tests. See *Rights of Illegitimates*, *supra* note 28, at 339. Similarly, an illegitimate child is eligible for some benefits under the Veterans' Administration Act on the death of his or her father if the child has been acknowledged in writing, if paternity has been adjudicated, if the father has been judicially ordered to contribute to the child's support, or if the administrator is convinced there is evidence to establish paternity. 38 U.S.C. § 101(4)(A) (1988).

of the state in which the insured individual is domiciled."³⁹ Finally, some federal benefits statutes make no specific provisions regarding the rights of illegitimate children, leading courts to create a federal rule governing the rights of illegitimate children when interpreting some statutes and to rely on state intestacy provisions for other statutes.⁴⁰

³⁹ 42 U.S.C. § 416(h)(2)(A) (1988). One commentator suggests this choice was apparently based on Congress's desire to respect state domestic relations policies. *Rights of Illegitimates*, *supra* note 28, at 341. Some states, however, deny or limit the illegitimate's right of inheritance from his or her father, but impose full support requirements on living fathers of illegitimate children. *Id.* at 341. Thus, the act's goal of providing benefits for dependents of the insured, a goal consistent with that of these states, may be frustrated by reliance on intestate succession laws to determine eligibility because these laws often prove insurmountable hurdles to illegitimate children seeking to prove paternity. *Id.*

⁴⁰ See *Rights of Illegitimates*, *supra* note 28, at 341-42. Courts that viewed statutes as providing benefits other than compensation for the loss of the deceased have relied on state intestacy provisions to define the rights of illegitimate children. See *id.* at 342-44. For example, the Copyright Act provides that the copyright holder's right of renewal may be exercised by the widow, widower or children. 17 U.S.C. § 304(a) (1988). The United States Supreme Court interpreted the definition of children as a question of the descent of property that should be controlled by the child's status under state law. See *De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956). Similarly, insurance benefits are paid under the Federal Employees' Group Life Insurance Act to, in order of preference, the beneficiary, the deceased's spouse, the deceased's children and their descendants by representation, and others. 5 U.S.C. § 8705(a) (1988). Courts have held that whether illegitimate children are included in the definition of children is controlled by state intestacy succession laws. See *Brantley v. Skeens*, 266 F.2d 447, 455 (D.C. Cir. 1959); *La Bove v. Metropolitan Life Ins. Co.*, 264 F.2d 233, 234-35 (3d Cir. 1959); *Rights of Illegitimates*, *supra* note 28, at 343. One commentator has suggested that courts that have relied on state laws presumably reasoned that a child not receiving support from his or her father did not need or deserve the right to the father's benefits created under the programs. See *Rights of Illegitimates*, *supra* note 28, at 343. On the other hand, some courts that perceived other statutes as providing compensation for actual pecuniary loss suffered by a beneficiary have established a federal rule to govern the rights of illegitimate children. *Id.* at 344-45. For example, the Federal Death on the High Seas Act provides compensation for the "actual pecuniary loss suffered by the decedent's wife, husband, parent, [or] child. . . ." 46 U.S.C. app. § 761 (1988). In *Middleton v. Luckenbach S.S. Co.*, the Court of Appeals for the Second Circuit reasoned that uniform treatment of children from different states whose parents were killed in the same maritime accident required a uniform federal definition of children that included illegitimates. 70 F.2d 326, 329 (2d Cir.), *cert. denied*, 293 U.S. 577 (1934). One commentator has suggested there was no justification for treating illegitimate children differently, because the statute's purpose was to provide compensation to those who have lost support, the inclusion of illegitimate children would not deprive other relatives of benefits and Congress expressed no preference. See *Rights of Illegitimates*, *supra* note 28, at 346. Courts have also interpreted the Jones Act, which provides a right of action for death of railway employees, as requiring a federal definition of children that includes illegitimates. See, e.g., *Civil v. Waterman S.S. Corp.*, 217 F.2d 94 (2d Cir. 1954); see also 46 U.S.C. app. § 688 (1988); *Rights of Illegitimates*, *supra* note 28, at 346-48. The Federal Employers' Liability Act provides a cause of action to employees of railroad common carriers for injury or death which survives for the benefit of an employee's spouse or children, and courts have deferred to state law for the definition of children under the act. See 45 U.S.C. §§ 51, 59 (1988); *Bowen v. N.Y. Cent. R.R.*, 179 F. Supp. 225, 226-27 (D. Mass. 1959); *Padgett v. Padgett*, 88 F. Supp. 630, 632-33 (S.D. Fla. 1950).

In addition to the federal restrictions on the rights of illegitimate children, some states impose a high burden of proof on children seeking to prove their fathers' paternity.⁴¹ Although many states treat paternity determination as a civil matter, requiring proof by a preponderance of the evidence, other states still reflect the criminal roots of paternity establishment and require clear and convincing evidence or proof beyond a reasonable doubt.⁴² Many statutes have long made it impossible for children to establish paternity after their fathers' deaths, especially for intestate inheritance purposes.⁴³ Where posthu-

⁴¹ See *infra* note 44 for a discussion of the burdens of proof imposed on children seeking to prove their father's paternity. Until recently, case law and state statutes made it almost impossible for an illegitimate child to legally establish paternity without the father's cooperation. See *Alexander v. Alexander*, 537 N.E.2d 1310, 1312 (Franklin County, Ohio C.P. 1988).

⁴² See Victoria S. Williams & Robert G. Williams, *Identifying Daddy*, *THE JUDGES' JOURNAL* 2, 4 (Summer 1989); Carol D. Browning, Note, *The Burden of Proof in a Paternity Action*, 25 J. FAM. L. 357, 364-68 (1987). Similarly, the standard for rebutting a presumption of paternity, such as that which accompanies the birth of a child to a married woman, is usually higher than the standard for proving paternity. See, e.g., UNIFORM PARENTAGE ACT §§ 4(b), 14(a) (1973) (an action under this act is a civil action; presumption must be rebutted only by clear and convincing evidence).

⁴³ See *Alexander*, 537 N.E.2d at 1312. Most statutes and case law provided that inheritance by an illegitimate child required public acknowledgment by the father that he was, in fact, the child's father. *Id.* This acknowledgment typically had to be a notarized writing or "open and notorious" or otherwise requiring an affirmative act by the father that was unobtainable after the putative father's death. See *id.* Several states still impose restrictions on an illegitimate child's ability to prove paternity and qualify for intestate succession from the putative father's estate that often effectively bar such an action. See, e.g., GA. CODE ANN. § 53-44(c) (Michie Supp. 1992) (clear and convincing evidence of paternity and of father's intent for child to inherit); LA. CIV. CODE ANN. art. 919 (West 1952) (paternity must have been duly acknowledged and father must have no descendants, ascendants, collateral relatives or wife); MASS. GEN. LAWS ANN. ch. 190, § 7 (West 1990) (action must be brought against administrator or executor); N.Y. EST. POWERS & TRUSTS LAW, § 4-1.2(2) (McKinney Supp. 1993) (requires adjudication during father's lifetime, clear and convincing evidence of open and notorious acknowledgment or that blood genetic tests had been performed during lifetime); N.C. GEN. STAT. § 49-14(c) (1984) (no action begun or adjudication made after putative father's death); OR. REV. STAT. § 112.105(2) (1987) (paternity established during father's lifetime or written acknowledgment); S.D. CODIFIED LAWS ANN. § 29-1-15.1 (Michie Supp. 1992) (requires marriage of parents, written acknowledgment, adjudication during father's life or clear and convincing evidence prior to estate settlement); VT. STAT. ANN. tit. 14, §§ 553, 554 (1989) (paternity judicially declared during putative father's life, or openly and notoriously acknowledged or intermarriage of parents); W. VA. CODE § 42-1-6 (1982) (requires marriage of parents); WIS. STAT. ANN. § 852.05(i) (West 1991) (paternity adjudicated during lifetime, admitted in open court or written acknowledgment). Some states also impose time restrictions on the bringing of a paternity action for intestate succession following the putative father's death. See, e.g., ARK. CODE ANN. § 28-9-209(a)(2)(d) (Michie 1987) (within 180 days); IND. CODE ANN. § 29-1-2-7(b)(1)(B) (Burns 1989) (within five months); S.C. CODE ANN. § 62-2-109 (Law. Co-op. Supp. 1992) (within eight months of death or six months of estate probate); S.D. CODIFIED LAWS ANN. § 29-1-15.1 (Michie Supp. 1992) (prior to estate settlement). While these restrictions are imposed for purposes of qualifying for intestate succession, they also have the effect of denying access to benefit programs, such as Social Security, which base eligibility

mous claims were allowed, the requirements of proof varied widely between the states.⁴⁴ Even though many states treat proof of paternity as a civil matter, the burden of proof in proving paternity is usually higher after the putative father has died.⁴⁵

Recently, the drafters of several proposed uniform acts have included provisions to ease the burdens the law places on illegitimate children. The Uniform Probate Code provides that children may take by intestate succession from their parents regardless of whether the parents were married.⁴⁶ The Uniform Act on Paternity includes provi-

upon qualification for descent of property from the father under state law. See 42 U.S.C. § 416(h)(2)(A) (1988).

⁴⁴ See *Inheritance Rights*, *supra* note 33, at 186-89 nn.112-18. Some states require proof by a preponderance of the evidence. See, e.g., COLO. REV. STAT. § 15-11-109(b)(II) (1987); DEL. CODE ANN. tit. 12, § 508 (2)(b) (1987); N.M. STAT. ANN. § 45-2-109(B)(3) (Michie 1989). Other states require proof by clear and convincing evidence. See, e.g., ALASKA STAT. § 13.11.045(2) (1985); ARIZ. REV. STAT. ANN. § 14-2109(2)(b) (1975); NEB. REV. STAT. § 30-2309(2)(ii) (1989) (strict, clear and convincing proof). Finally, some states impose even higher burdens of proof. See, e.g., ARK. CODE ANN. § 28-9-209(d) (Michie 1987) (acknowledgment includes written acknowledgment, consent to name appearing on the child's birth certificate, or a voluntary promise to support the child); CONN. GEN. STAT. § 45a-438(b)(2)(B) (West 1993) (prior adjudication, acknowledgment in writing and under oath or clear and convincing evidence of both written acknowledgment and openly treating child as own); IOWA CODE ANN. § 633.222 (West 1992) (general and notorious or written acknowledgment); N.C. GEN. STAT. § 29-19(b)(2) (1984) (acknowledgment must be in writing before a certifying officer, and filed with clerk of superior court).

⁴⁵ See *Browning*, *supra* note 42, at 360, 363. The majority of states use a preponderance of the evidence standard for paternity actions brought during the putative father's lifetime, while posthumous actions often require clear and convincing evidence. *Id.*; see, e.g., ALA. CODE § 43-8-48(2)(b) (1991) (clear and convincing evidence for posthumous actions); ALASKA STAT. § 13.11.045 (1985) (same); ARIZ. REV. STAT. ANN. § 14-2109(2)(b) (1975) (same); GA. CODE ANN. § 53-4-4(c)(1)(E) (Michie Supp. 1992) (clear and convincing evidence that father intended child to share in estate); IDAHO CODE § 15-2-109(b)(2) (1979) (clear and convincing evidence); KY. REV. STAT. ANN. § 391.105(c) (Michie/Bobbs-Merrill Supp. 1992) (same); MISS. CODE ANN. § 91-1-15(3) (Law. Co-op. Supp. 1992) (same); MO. ANN. STAT. § 474.060(2)(2) (Vernon 1992) (same); NEB. REV. STAT. § 30-2309(2) (1989) (strict, clear and convincing proof); N.H. REV. STAT. ANN. § 561:4(II) (Butterworth Supp. 1992) (clear and convincing evidence); N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(B) (McKinney Supp. 1993) (clear and convincing evidence of open and notorious acknowledgment or blood genetic tests had proven paternity); 20 PA. CONS. STAT. ANN., § 2107(c) (1992) (clear and convincing evidence); R.I. GEN. LAWS § 15-8-8 (1988) (same); S.C. CODE ANN. § 62-2-109 (Law. Co-op. Supp. 1992) (same); S.D. CODIFIED LAWS ANN. § 29-1-15.1 (Michie Supp. 1992) (same, prior to estate settlement); TENN. CODE ANN. § 31-2-105(2)(B) (Supp. 1992) (clear and convincing evidence); UTAH CODE ANN. § 75-2-109(2)(b) (1993) (same).

⁴⁶ UNIFORM PROBATE CODE, § 2-114(a) (1990). The relevant section reads in part:

(a) [F]or the purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].

Id.

sions equating the responsibilities of fathers of illegitimate children with those of fathers of legitimate children.⁴⁷ The Uniform Parentage Act contains similar provisions.⁴⁸ The provisions of these acts regarding proof of paternity, however, generally assume that the putative father is alive and a party to the action.⁴⁹ They do not include provisions for testing parties other than the mother, child and putative father.⁵⁰ The modern trend is toward treating children equally, regardless of their parents' marital status, but fails to recognize the utility of performing blood or DNA tests on collateral persons.

One state, Minnesota, has realized the efficacy of testing persons other than the mother, child and putative father and enacted a law in 1983 providing for testing relatives of a deceased putative father.⁵¹ In 1987, in *Voss v. Duerschel* ("Voss I"), the Court of Appeals of Minnesota held that a deceased putative father's relatives were proper parties to a paternity action and that ordering them to submit to blood tests did not violate state or federal constitutional rights to due process and

⁴⁷ UNIFORM ACT ON PATERNITY § 1 (1960). The relevant part reads:

The father of a child which is or may be born out of wedlock is liable to the same extent as the father of a child born in wedlock, whether or not the child is born alive, for the reasonable expense of the mother's pregnancy and confinement and for the education, necessary support and funeral expenses of the child. A child born out of wedlock includes a child born to a married woman by a man other than her husband.

Id.

⁴⁸ UNIFORM PARENTAGE ACT §§ 1, 2 (1973) The relevant section reads in part:

As used in this Act, "parent and child relationship" means the legal relationship existing between a child and his natural parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

Id. at § 1. Section 2 provides that, "[t]he parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents." *Id.* at § 2.

⁴⁹ See, e.g., UNIFORM PARENTAGE ACT §§ 9, 11 (1973); UNIFORM ACT ON PATERNITY § 7 (1960).

⁵⁰ See, e.g., UNIFORM PARENTAGE ACT § 11 (1973); UNIFORM ACT ON PATERNITY § 7 (1960).

⁵¹ Minnesota law provides that:

If the alleged father is dead, the court may, and upon request of a party shall, require the decedent's parents or brothers and sisters or both to submit to blood tests. However, in a case involving these relatives of an alleged father, who is deceased, the court may refuse to order blood tests if the court makes an express finding that submitting to the tests presents a danger to the health of one or more of these relatives that outweighs the child's interest in having the tests performed. Unless the person gives consent to the use, the results of any blood tests of the decedent's parents, brothers or sisters may be used only to establish the right of the child to public assistance including but not limited to social security and veterans' benefits.

MINN. STATS. § 257.62(1) (1992).

privacy.⁵² The trial court had ordered the putative father to undergo blood tests, but he died before his scheduled test.⁵³ A subsequent trial court ordered the deceased's father, brother and sister to submit to blood tests, and they appealed the order.⁵⁴ In analyzing the constitutionality of ordering the relatives to submit to testing, the court of appeals considered four factors in a right-to-privacy balancing analysis: 1) the importance of the state's purpose in requiring the intrusion in question; 2) the nature and seriousness of the intrusion; 3) whether the state's purpose justified the intrusion; and 4) whether the means adopted was proper and reasonable.⁵⁵ The court reasoned that, with respect to parties other than the putative father, these factors translated into: 1) the state's interests in accurate and efficient resolution of paternity actions; in ensuring the proper allocation of public assistance funds among county, state and federal agencies and in protecting the child's interest in knowing the identity of his or her father; 2) a limited form of intrusion into bodily integrity or privacy; 3) important state interests that justified a minimal intrusion; and 4) means that were proper, safe and reasonable.⁵⁶ Thus, the appeals court held that the deceased's father, brother and sister could be ordered to submit to blood tests to determine if the deceased was the plaintiff's father.⁵⁷

In 1988, however, in *Voss v. Duerschel* ("*Voss II*"), the Supreme Court of Minnesota held that the underlying paternity action had not survived the putative father's death, due to the lack of any personal representative for the deceased's estate, and that the action could not be pursued against the deceased's father and siblings.⁵⁸ The supreme court noted that the court of appeals had based its finding, in part, on a previous decision by the Supreme Court of Minnesota holding that a paternity action for purposes of inheritance survived the putative father's death when the personal representative of the deceased's estate was substituted as defendant.⁵⁹ The Supreme Court of Minnesota reasoned that expanding the survivability of posthumous paternity

⁵² 408 N.W.2d 161, 165-67 (Minn. Ct. App. 1987), *rev'd on other grounds*, 425 N.W.2d 828, 830-31 (Minn. 1988).

⁵³ *Voss*, 425 N.W.2d at 162.

⁵⁴ *Id.* at 162-63. The case involved three referees, nine trial courts and two appellate hearings before the relatives were finally ordered to submit to blood testing by the third referee and ninth trial court. *Id.* This order was then appealed. *Id.* at 163.

⁵⁵ *Id.* at 166-67.

⁵⁶ *Id.* at 167.

⁵⁷ *Id.*

⁵⁸ 425 N.W.2d 828, 831 (Minn. 1988) [hereinafter *Voss III*].

⁵⁹ *Voss II*, 425 N.W.2d at 830-31. In *Voss II*, however, the deceased's personal representative was discharged before the trial court could make a paternity adjudication. *Id.* at 831.

actions to include general paternity determinations could have consequences concerning rights of inheritance from or through collateral relatives, statutes banning prohibited marriages, claims related to artificial insemination or surrogate parentage and other equally serious areas.⁶⁰ The *Voss II* court further reasoned that neither statutory nor case law supported the magnitude of potential consequences that would flow from allowing a general paternity action to survive against the deceased's relatives, rather than only allowing inheritance actions to survive against the deceased's personal representative.⁶¹ The court held that, despite the statute's clear provisions, the underlying paternity action had not survived the discharge of the deceased's personal representative and the trial court could not order blood testing of the deceased's relatives.⁶² It specifically noted that its decision made unnecessary a discussion of the constitutionality of the statute allowing the testing of a deceased putative father's relatives.⁶³ Thus, the actual utility of the law in posthumous paternity actions remains unclear.⁶⁴

Despite the modern trends toward expanded rights for illegitimate children and facilitation of posthumous paternity actions, there are still those who oppose granting illegitimate children rights identical to those of their legitimate playmates. Supporters of increasing the burdens of proof on illegitimate children have justified such statutes in three ways.⁶⁵ First, treating illegitimate children differently has been justified as discouraging behavior many people find immoral, such as sexual relations outside of marriage.⁶⁶ This rationale assumes potential parents will be so worried about the treatment facing their illegitimate child after the parents' death that they will refrain from illicit conduct.⁶⁷ Punishing one class of individuals to create guilt in another group, however, has been found both ineffective and lacking a legitimate governmental purpose.⁶⁸ The United States Supreme Court has

⁶⁰ *Id.* at 830-31.

⁶¹ *Id.* at 831.

⁶² *Id.*

⁶³ *Id.* at 831 n.10.

⁶⁴ See *Voss II*, 425 N.W.2d at 831 n.10.

⁶⁵ See Krause, *supra* note 31, at 489-95. Cultural bias against illegitimate children is so deeply rooted that statutes affecting their rights usually do not include a legislative declaration of intent or purpose. *Id.* at 489. One commentator has suggested the real motivation behind such laws was that legislators, as men, wanted to limit their unintentional offspring's claims against them. See *id.* at 499. Under this theory, claims of illegitimate mothers and children would have received little counter balancing support. *Id.* Moreover, legitimate wives had an interest in denying any illegitimate children's claims that would come at the expense of the legitimate family. *Id.*

⁶⁶ *Id.* at 492.

⁶⁷ *Id.*

⁶⁸ *Id.* at 492 & n.60. The ineffectiveness of legislation denying rights to illegitimate children

held that denial of rights to illegitimate children based on their parents' "morals," as a way of discouraging bringing children into the world out of wedlock, was a form of invidious discrimination against the children and clearly violated the Equal Protection Clause.⁶⁹

Supporters of laws limiting the rights of illegitimate children also claim that the discrimination protects the family by encouraging marriage and by protecting the economic and social strength of existing families.⁷⁰ They argue that removing the social stigma of giving birth to an illegitimate child would destroy a major incentive for marriage.⁷¹ Moreover, they contend that a family's economic strength would be threatened by forcing legitimate children to share their fathers' wealth with his illegitimate offspring.⁷² Finally, they assert that the family's social fabric would be threatened by compelling the wife to accept any relationship with her husband's illegitimate child.⁷³ As one commentator has noted, these arguments do not address cases in which children bring actions following their fathers' deaths solely to qualify for state or federal benefits.⁷⁴

The third and most common justification advanced for restrictions on posthumous claims of paternity is a fear of fraud, including collusive suits and spurious claims.⁷⁵ Although the United States Su-

as a way of discouraging nonmarital sexual relations is demonstrated by the fact that 27% of births in the United States in 1989 were nonmarital. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, at 69 (112th ed. 1992). Furthermore, as one commentator has noted, birth in wedlock is not foolproof evidence that "immoral" behavior has not occurred. Krause, *supra* note 31, at 491. According to the Janus Report on Sexual Behavior, one in four married women has had at least one extramarital experience. Jack Thomas, *Let's Get Physical*, BOSTON GLOBE, Feb. 23, 1993, at 25.

⁶⁹ *Levy v. Louisiana*, 391 U.S. 68, 70-72 (1968) (Court struck down statute denying illegitimate children right to recover for mother's wrongful death, as invidious); *Trimble v. Gordon*, 430 U.S. 762, 763, 770 (1977) (Court struck down statute allowing intestate succession from mother, but not from father, because illegitimate children cannot affect parents' conduct nor change their own status).

⁷⁰ See Krause, *supra* note 31, at 492-95.

⁷¹ See *id.* at 493. This argument is similar to the "morals" argument, and operates by punishing one group to shame another into adopting desired behavior. See *supra* notes 66-69 and accompanying text for a discussion of disadvantaging illegitimate children to create guilt in their parents.

⁷² Krause, *supra* note 31, at 494. As one commentator has noted, these statements are equally applicable to the husband's legitimate children from a previous marriage—an increasingly common phenomenon in the United States. *Id.*

⁷³ *Id.*

⁷⁴ See *Rights of Illegitimates*, *supra* note 28, at 353.

⁷⁵ See Major David B. Howlett, *Illegitimate Children and Military Benefits*, 132 MIL. L. REV. 5, 15 (1991). Problems of proof, especially when the putative father is deceased, have long served as the justification for distinctions between maternal and paternal intestate inheritance rights. *Inheritance Rights*, *supra* note 33, at 171; *Trimble v. Gordon*, 430 U.S. 762, 771 (1977) ("the lurking problems with respect to proof of paternity").

preme Court has indicated that concerns over proof must be real, the Court has upheld a statute discriminating against illegitimate children as justified by this concern.⁷⁶ On the other hand, the Court also has used scientific advances in blood testing as the basis for striking down statutes restricting paternity actions.⁷⁷ Moreover, the Court has recognized the right to use blood tests to determine paternity.⁷⁸ Thus, advances in DNA-based paternity testing are causing a reconsideration of historical assumptions about the problems of proof.⁷⁹

II. SCIENTIFIC PATERNITY TESTING

*For paternity applications, the odds that two unrelated people possess the same DNA band pattern have been calculated to be, on average, 30 billion to 1. Given that the Earth's population is about 5 billion people (only 2.5 billion males) it is impossible to be more sure of a paternity determination with any other available test.*⁸⁰

A. Traditional Blood Based Paternity Testing

Modern blood testing methods for paternity determination are based on the scientific laws of heredity and long accepted genetic

⁷⁶ *Lalli v. Lalli*, 439 U.S. 259, 262, 275-76 (1978) (statute requiring court order of filiation during father's lifetime as predicate to illegitimate child's intestate inheritance upheld as substantially related to state interest in avoiding particular problems of proof in posthumous paternity determination); *Trimble*, 430 U.S. at 771 (problems of proof cannot be made into an impenetrable barrier to bar illegitimate child from inheriting).

⁷⁷ See *Clark v. Jeter*, 486 U.S. 456, 463 (1988) (six-year statute of limitations not substantially related to important state interest in preventing fraudulent claims given scientific advances in blood testing); *Pickett v. Brown*, 462 U.S. 1, 17-18 (1983) (two-year statute of limitations not substantially related to legitimate state interest in preventing fraudulent claims given scientific advances in blood testing). Scientific advances have also caused courts to strike down or modify laws in other areas. For a discussion of scientific advances undercutting the justification for regulation of second-trimester abortions, restrictions on Medicaid nursing care and the common law year-and-a-day rule—which made no one responsible for a killing where death occurred that long after the act, see Marcia F. Shissler, *Social Security—Paternity Testing Turns the Dependency Requirement for Posthumous Illegitimate Children Into an Anachronism*, 64 TEMP. L. REV. 869, 877-78 & n.82 (1991). Shissler discusses the denial of Social Security Act survivor benefits to an illegitimate child whose father died before the child was born, based on the failure to show actual dependency, despite a blood test that established paternity to a 99.8% certainty. See *id.* at 883. She argues that scientific advances have undercut the rationale behind the support requirement, rendering it anachronistic. See *id.*

⁷⁸ See *Little v. Streater*, 452 U.S. 1, 16-17 (1981) (denying incarcerated defendant blood grouping test to defend paternity action, due to inability to pay, violated Due Process Clause).

⁷⁹ See, e.g., *Alexander v. Alexander*, 537 N.E.2d 1310, 1314 (Franklin County, Ohio C.P. 1988) ("[T]he law must keep pace with these [DNA testing] developments."); see also MINN. STAT. § 257.62, subd. 1 (West 1992) (deceased's relatives may be required to submit to blood tests now available for posthumous paternity determination).

⁸⁰ CELLMARK, *supra* note 16, at 8.

principles.⁸¹ An individual's physical characteristics are determined by chromosomes inherited in equal shares from the mother and father.⁸² These chromosomes contain genetic markers that determine all of an individual's inherited characteristics.⁸³ Blood tests to determine paternity rely on the presence of these inherited and identifiable genetic markers in human blood cells.⁸⁴

Traditional blood tests work on the principle of exclusion.⁸⁵ The genetic traits that must appear in the biological father's blood are determined by subtracting the variations in genetic markers that occur in the mother's blood from those present in the child's blood.⁸⁶ If the markers in the alleged father's blood do not fall into the required range, he is excluded from paternity.⁸⁷ If they match, he is not excluded, but this does not mean he is the actual father.⁸⁸ Depending on the test used, the percentage of the population excluded may vary from less than sixty percent to over ninety-nine percent.⁸⁹ Traditional

⁸¹ See *Scientific Testing*, *supra* note 2, at 92.

⁸² David B. Jackson, *DNA Fingerprinting and Proof of Paternity*, 15 Fam. Law Rep. (BNA) 3007, 3007 (May 16, 1989). Most human cells contain 46 chromosomes, paired in 23 sets, with one member of each set coming from each parent. See *Scientific Testing*, *supra* note 2, at 92. The major exceptions are sperm and ova, which contain only 23 chromosomes. See Jackson, *supra*, at 3007. Thus, an embryo obtains a complete set of 46 chromosomes, half from each parent. *Id.* at 3007-08.

⁸³ *Scientific Testing*, *supra* note 2, at 92. The basic principles of the Mendelian laws of inheritance, named after the founding father of modern genetics, which control inheritance of genetic traits, are: 1) a child cannot have a genetic trait, or marker, that is absent in both parents; 2) a child must inherit one half of each pair of genetic markers from each parent; 3) a child cannot have a pair of identical genetic markers unless both parents have the same markers; 4) a child must have a genetic marker if it is present as an identical pair in one parent, because the parent contributes half of each of its genetic pairs to the child. Lake & Paulson, *supra* note 7, at 41.

⁸⁴ *Scientific Testing*, *supra* note 2, at 92.

⁸⁵ See *id.*

⁸⁶ See *id.*

⁸⁷ *Id.*

⁸⁸ *Id.* Some markers have few possible values and, thus, each value is very common in the general population. For example, in the ABO blood type system, the frequency distribution is approximately 40% type A, 14% type B, 3% type AB and 43% type O. PAUL, C. GIANNELLI & EDWARD J. IMWINKELRIED, *SCIENTIFIC EVIDENCE* 605 (1986). Failure to exclude an alleged father with the type O blood required of the biological father merely means he is one of 43% of the male population that could be the child's biological father. See *id.*

⁸⁹ Since the discovery of ABO typing, at the beginning of this century, about 20 different blood antigens have been identified for use in paternity tests. Lake & Paulson, *supra* note 7, at 41. Testing for all of these may still fail to exclude up to 40% of falsely accused men. *Id.* at 42. Testing for enzymes and serum proteins found in red blood cells may fail to exclude 15-20% of falsely accused men. See *Scientific Testing*, *supra* note 2, at 94. Even combining enzyme and serum protein with antigen tests will still fail to exclude 4-11% of falsely accused men. See *id.* Human

blood tests are unavailable, however, when the putative father is deceased because blood is discarded and replaced with embalming fluid when the body is prepared for burial.⁹⁰ Even if a blood sample is available, there are serious reliability questions when blood tests are performed on old samples.⁹¹

B. DNA-Based Paternity Testing

DNA testing, on the other hand, has the potential to go beyond exclusion to positive identification of the biological father.⁹² Except for identical twins, each person's DNA is unique.⁹³ As current tests only measure selected portions of DNA, two people could theoretically have the same DNA fingerprint; estimates of that actually occurring, however, are as low as one in thirty billion.⁹⁴ Thus, the high level of exclusion possible with DNA tests can effectively identify a putative father as the biological father.⁹⁵

Leukocyte Antigen (HLA) tests, which compare antigens found in white blood cells, may fail to exclude up to 10% of falsely accused men, depending upon the rarity of the particular antigens found. *See id.* at 94-95. A combined HLA and red blood cell antigen test may still fail to exclude more than 1% of falsely accused men. *See id.* In a city of 500,000 people, half of each sex, this would still leave at least 2500 men whose innocence could not be proven if they were falsely accused.

⁹⁰ Telephone Interview with Jennifer Mihalovich, Forensic Science Associates (Jan. 22, 1993).

⁹¹ *See* GIANNELLI & IMWINKELRIED, *supra* note 88, at 585. HLA tests are unavailable because they require live blood. Lake & Paulsen, *supra* note 7, at 42. HLA tests must be performed within 24 hours from the time the blood sample is drawn and the blood cannot be refrigerated before testing. *Id.*

⁹² *See* Jackson, *supra* note 82, at 3012.

⁹³ *Id.* at 3008.

⁹⁴ *Id.* at 3012. This figure, using Cellmark Diagnostic's test, was derived from a 1985 study of 20 unrelated Caucasians reported by Dr. Alec Jeffreys, the developer of the DNA fingerprinting process. *Id.* at 3011-12. A later study calculated the chance of identical DNA fingerprints for two African-Americans at 1 in 1.4 billion and for two American Caucasians at 1 in 840 million. *Id.* at 3912. One court, in presenting a detailed summary of the test technique and statistical reliability, reduced the ratios by a factor of 10 to eliminate any possibility that the genes being measured were not constant in the population from generation to generation. *See* *People v. Wesley*, 533 N.Y.S.2d 643, 659 & n.26 (Albany County Ct. 1988). In a comprehensive study, Yale University researchers analyzed DNA patterns of almost 7000 people, using databases of the Federal Bureau of Investigation and Lifecodes Corp., and conservatively estimated the odds that two people would have matching DNA fingerprints at one in a million at best. *Yale Scientists Find Odds of DNA Match 1 in a Million*, Reuters, Feb. 7, 1992, available in LEXIS, Nexis Library, Reuter File.

⁹⁵ *See* Jackson, *supra* note 82, at 3007, 3012. Even with more conservative estimates, the chance of a randomly selected man's genetic make-up matching the biological father's as closely as the putative father would be 1 in 140 million for African-American and 1 in 84 million for Caucasian American. *Id.* at 3012. This exclusion rate is orders of magnitude better than possible with other tests. *See supra* note 89 for a discussion of the exclusion limitations of other blood-based tests.

DNA-based paternity testing relies on well-accepted principles of cellular molecular biology.⁹⁶ Found in the nuclei of every cell except red blood cells, the DNA molecule is a "double helix" formed by two strands of nucleotides, one from each parent, connected to form a twisted ladder.⁹⁷ DNA fingerprinting represents portions of a person's DNA as "bar codes" that may be compared with those of other individuals.⁹⁸ By comparing the DNA fingerprints of the child, mother and putative father, it is possible to determine if the man could have fathered the child.⁹⁹

The process of DNA fingerprinting is easily described, although the actual procedure requires carefully controlled steps.¹⁰⁰ DNA is first extracted from blood or other tissues of the mother, child and putative father.¹⁰¹ Restriction enzymes are then used to cut the DNA into many smaller fragments of various lengths.¹⁰² Some of the resulting frag-

⁹⁶Jackson, *supra* note 82, at 3007. The theory underlying DNA is so well accepted that, among informed scientists, dissenting points of view are "almost totally absent." William C. Thompson & Simon Ford, *DNA Typing: Acceptance and Weight of the New Genetic Identification Tests*, 75 VA. L. REV. 45, 60-61 (1989). The fundamental premises of DNA testing are the following: each individual, except identical twins, has unique DNA that does not vary from cell to cell; an individual's DNA does not change during his or her lifetime; DNA's structure is a long twisted ladder, or double helix, that can be disassembled by breaking the long chain into shorter fragments or by "unzipping" the two sides of the ladder into single strands; and single strands will only pair with complementary strands of a certain molecular pattern. *Id.* at 61-63.

⁹⁷GIANNELLI & IMWINKELRIED, *supra* note 88, at 603, 103 (Supp. 1991); Jackson, *supra* note 82, at 3007. A cell's chromosomes contain nucleic acids, including DNA, which are composed of nucleotides. Jackson, *supra* note 82, at 3007. Nucleotides are strings of alternating sugars and phosphates with bases attached to each sugar. *See id.* The six-foot long DNA molecule is composed of about three billion base pairs connected in a unique pattern. *Id.*; GIANNELLI & IMWINKELRIED, *supra* note 88, at 113 (Supp. 1991).

⁹⁸Jackson, *supra* note 82, at 3008. "DNA fingerprint" refers to a bar code representation of portions of a person's DNA; it expresses the individualized nature of these bar codes, analogous to the uniqueness of an individual's fingerprints.

⁹⁹*Id.*

¹⁰⁰*See* Thompson & Ford, *supra* note 96, at 64. Molecular biologists have accepted and used these procedures for many years. *Id.* at 68, 69, 71 & n.119, 72, 74. The process described here is used by Cellmark and Lifecodes, the two pioneering companies in DNA testing for forensic and paternity purposes. *Id.* at 64. A different approach, based on the same underlying scientific principles, was developed by Cetus Corporation and is used by Forensic Science Associates. *See id.* at 64, 76, 78 n.115.

¹⁰¹Jackson, *supra* note 82, at 3008.

¹⁰²Thompson & Ford, *supra* note 96, at 67. A restriction enzyme recognizes a specific palindromic sequence of four to eight base pairs that occurs repeatedly throughout the DNA molecule. Jackson, *supra* note 82, at 3008. Another method uses restriction enzymes called single-locus probes that detect a DNA sequence located on a single chromosome. CELLMARK, *supra* note 16, at 4. These will not uniquely identify an individual, since many people have the same genetic characteristics. *Id.* Use of several single-locus probes and statistics showing what percentage of the population shares the particular combination of genetic traits, may allow for

ments are polymorphic, meaning they differ in length between individuals.¹⁰³ These fragments are sorted according to length on a slab of agarose gel.¹⁰⁴ Next, the fragments are permanently affixed to a nylon membrane.¹⁰⁵ Radioactive probes are then used to identify polymorphic segments amid the DNA fragments on the membrane.¹⁰⁶ Finally, this membrane is placed on an X-ray film, exposing it and producing a pattern of elongated blobs or bands known as a "DNA fingerprint."¹⁰⁷

Interpretation of the fingerprints is the final step in DNA-based paternity testing.¹⁰⁸ The bands in the child's DNA fingerprint that must have come from the biological father are compared to those found in the putative father's fingerprint.¹⁰⁹ The probability that two unrelated

identification where the detected traits vary widely in different people. *Id.* Single-locus probes are more appropriate for forensic purposes, while multi-locus probes are considered statistically stronger for paternity testing. Jackson, *supra* note 82, at 3011.

¹⁰³Thompson & Ford, *supra* note 96, at 64. There are patterns of repeated short base pair sequences within the DNA molecule. Jackson, *supra* note 82, at 3009. The number of repetitions of these sequences varies from person to person. *Id.* Thus, fragmenting two individuals' DNA at the same sites produces different length fragments due to differences in the number of repeated base pairs in the fragments. *Id.* Related individuals share some base pair repeat sequences, producing identical length fragments which, in turn, produce identical patterns in their DNA fingerprints. *See id.*

¹⁰⁴A solution containing the DNA fragments is placed in a slot at one end of a slab of agarose gel. Jackson, *supra* note 82, at 3008. An electric current is applied across the gel, causing the negatively charged DNA fragments to move toward the positive electrode. *See* Thompson & Ford, *supra* note 96, at 69. Shorter fragments move faster than longer fragments, producing parallel rows across the gel ordered by fragment length. *Id.* In paternity testing, DNA samples from the child, mother and putative father are treated with the same restriction enzymes and distributed in parallel rows on the gel, so the resulting patterns may be easily compared. Jackson, *supra* note 82, at 3008.

¹⁰⁵Jackson, *supra* note 82, at 3008-09. In a process known as "Southern blotting," after the scientist who invented it, a nylon membrane is laid across the gel slab. *Id.* Capillary action carries the DNA fragments and binds them to the membrane in the same positions they occupied in the gel. *See* Thompson & Ford, *supra* note 96, at 71 & n.120. The double-stranded fragments are then treated with a chemical which causes them to "unzip" into single strands. *Id.* at 71.

¹⁰⁶Thompson & Ford, *supra* note 96, at 71. Probes are single strand segments of DNA that only bind to specific DNA sites occurring in, or adjacent to, identified polymorphic regions. *Id.* at 71 & n.122.

¹⁰⁷*Id.* at 74; Jackson, *supra* note 82, at 3009. Each band's location indicates the length of a particular polymorphic DNA fragment. Thompson & Ford, *supra* note 96, at 74. Because the lengths of these segments vary between individuals, the positions of the bands on different individuals also tend to differ. *Id.*

¹⁰⁸*See* Jackson, *supra* note 82, at 3009-11.

¹⁰⁹CELLMARK, *supra* note 16, at 6-7. All the bands in a child's DNA fingerprint must be in one or both of the biological parent's patterns, as the child's entire DNA sequence was provided by its parents. *See* Lake & Paulsen, *supra* note 7, at 41. Bands in two specimens are parallel only when the two DNA samples contain matching genetic material. Jackson, *supra* note 82, at 3009.

individuals will share a single band is estimated at twenty-five percent.¹¹⁰ The more bands assigned to the biological father that match those of the putative father, the lower the probability that anyone else could be the child's father.¹¹¹ The probability of a random man having the same band pattern as the biological father is often so small that if the putative father's bands match there is almost no chance that he is not the child's father.¹¹²

DNA fingerprinting can establish paternity even when the putative father is deceased because DNA testing uses molecules that remain stable and testable long after death.¹¹³ For example, preserved blood

Eliminating those bands in the child's fingerprint also present in the mother's fingerprint leaves a pattern of bands that must be present in the father's fingerprint. *See id.* If these are not found in the putative father's fingerprint then he is excluded from paternity. *Id.* If the bands match, the child and man share certain identical genetic characteristics. *Id.* Usually, all the bands match, or none do, according to Cellmark Diagnostics, a commercial laboratory using the pioneering techniques of Professor Alec Jeffreys. *Id.* at 3011.

¹¹⁰ CELLMARK, *supra* note 16, at 7.

¹¹¹ *Id.* As the table below shows, the more bands that match, the lower the probability of an unrelated individual having the same pattern of bands:

Number of Matching Bands	Probability of Unrelated Individual Having Same Bands
1	1 in 4
2	1 in 16
4	1 in 250
8	1 in 65,000
12	1 in 17,000,000
16	1 in 4,300,000,000
18	1 in 68,000,000,000

Id. One or two (and in extremely rare instances three) unassigned bands may result from mutations in inheritance. *Id.* The presence of bands in the child's fingerprint not assigned to either the mother or the putative father reduces the probability of the alleged father's paternity. *Id.* at 7-8. For example, if 14 non-maternal bands are all found in the putative father, the probability that an unrelated man has the same bands is 1 in 268,000,000. *Id.* at 8. If 14 of 15 non-maternal bands are found in the putative father, the probability of an unrelated man having 14 of the 15 bands is only 1 in 23,000,000. *Id.* This lower probability of a random match results because there is more chance of randomly choosing 14 of 15 items than there is of choosing 14 out of 14. *Id.* For a detailed discussion of probability calculations in determining paternity, using HLA test probabilities, see D.H. Kaye, *The Probability of an Ultimate Issue: The Strange Case of Paternity Testing*, 75 IOWA L. REV. 75 (1989).

¹¹² *See* CELLMARK, *supra* note 16, at 8.

¹¹³ *See id.* at 8; *see, e.g., Body in Cambodia Identified as Missing Reporter*, BOSTON SUNDAY GLOBE, Jan. 17, 1993, at 7 (DNA tests identify body exhumed in 1992 in Cambodia as Welles Hangen, NBC correspondent executed by Khmer Rouge in 1970); Nigel Hawkes, *DNA Test Identifies Tsarina's Bones*, THE TIMES (London), Dec. 11, 1992, at Home News section (DNA tests identify bodies unearthed in eastern Russia in 1991 as members of Russian imperial family,

or tissue samples from the deceased putative father may be used.¹¹⁴ Other sources include pulled head hair with intact roots, fingernail clippings, dried blood stains and biopsy samples.¹¹⁵ Moreover, if samples of the putative father's DNA are unavailable, it may be possible to reconstruct his DNA fingerprint by using samples from close relatives.¹¹⁶ With samples from both parents of the putative father, it is possible to determine paternity with practically the same certainty as if the man's DNA was available.¹¹⁷ If the parents are deceased, samples from the putative father's legitimate children and/or his siblings may be sufficient to reconstruct the man's DNA fingerprint.¹¹⁸ Thus, DNA testing provides, for the first time, the potential for accurate posthumous paternity identification.¹¹⁹

executed by the Bolsheviks in 1918); Steven Connor & Michael Sheridan, *British Scientists End the Long Search for Josef Mengele*, THE INDEPENDENT (London), Apr. 5, 1992, at 10 (DNA tests identify man who died and was buried in 1979 as Waffen-SS officer Josef Mengele).

¹¹⁴ CELLMARK, *supra* note 16, at 8. Samples preserved in saline or by freezing are preferred; formaldehyde preservation, common in embalming, appears to reduce testing accuracy. Telephone Interview with Jennifer Mihalovich, Forensic Science Associates (Jan. 22, 1993). Tests on exhumed males may fail to exclude up to 40% of the population, due to the degraded condition of most corpses. *Id.* Cellmark Diagnostics does not perform tests on embalmed tissue due to problems caused by formaldehyde. Telephone Interview with Karla Weaver, Cellmark Diagnostics (Jan. 22, 1993). Lifecodes Corporation estimates that its RFLP testing is successful in only 20–25% of exhumation cases. Telephone Interview with Dr. Michael Baird, Lifecodes Corporation (Jan. 22, 1993).

¹¹⁵ Telephone Interview with Jennifer Mihalovich, Forensic Science Associates (Jan. 22, 1993). Care must be exercised in using secondary sources such as hair to ensure the sample actually came entirely from the deceased and is not contaminated by biological material from other individuals. *Id.* Other sources for DNA analysis samples have included semen samples, an aborted fetus in a rape case, bone marrow, amniotic fluid, tissue, tooth pulp, saliva, urine and sweat. JoAnn Marie Longobardi, Note, *DNA Fingerprinting and the Need for a National Data Base*, 17 FORDHAM URB. L.J. 323, 336–37 (1989).

¹¹⁶ CELLMARK, *supra* note 16, at 8.

¹¹⁷ *Id.*

¹¹⁸ Telephone Interview with Jennifer Mihalovich, Forensic Science Associates (Jan. 22, 1993).

¹¹⁹ See, e.g., Body in Cambodia Identified as Missing Reporter, BOSTON SUNDAY GLOBE, January 17, 1993, at 7; Nigel Hawkes, *DNA Test Identifies Tsarina's Bones*, THE TIMES (London), December 11, 1992, at Home News section; Steven Connor & Michael Sheridan, *British Scientists End the Long Search for Josef Mengele*, THE INDEPENDENT (London), April 5, 1992, at 10. The three largest private DNA testing laboratories in the United States have all performed paternity tests where the putative father was deceased. Telephone Interview with Dr. Michael Baird, Lifecodes Corporation (Jan. 22, 1993) (less than 10% of Lifecode's business involves deceased putative fathers); Telephone Interview with Karla Weaver, Cellmark Diagnostics (Jan. 22, 1993) ("We do it all the time"); Telephone Interview with Jennifer Mihalovich, Forensic Science Associates (Jan. 22, 1993) (rarely involving exhumed bodies).

III. DNA-RELATED POSTHUMOUS PATERNITY CASES

*The problems of proof which have been the basis of denying inheritance rights to illegitimate children have been removed by the advent of this new genetic [DNA] testing. Therefore, this court can no longer be a participant in denying the opportunity to an illegitimate child to prove his paternity. . . .*¹²⁰

Courts have responded in several ways to the admissibility of DNA test results to determine paternity after the putative father's death.¹²¹ Where the cases involved directly testing the deceased's genetic material, courts have generally upheld such testing unless barred from doing so by a specific statute.¹²² On the other hand, when the cases have involved testing the deceased's relatives to determine the deceased's DNA fingerprint, several courts have struggled to balance the right of illegitimate children to prove paternity with the privacy interests of those to be tested.¹²³ Under this balancing, some of the courts have ordered testing based on either the court's own inherent powers or a statutory interpretation.¹²⁴ Other courts have found themselves prevented from ordering DNA testing of third parties by statutes.¹²⁵

A. Testing the Deceased Putative Father's Genetic Material

The question of using DNA testing of a deceased putative father's genetic material to determine paternity has been one of first impres-

¹²⁰ *Alexander v. Alexander*, 537 N.E.2d 1310, 1314 (Franklin County, Ohio C.P. 1988), *dismissed as moot*, 560 N.E.2d 1337, 1339 (Ohio Ct. App. 1989).

¹²¹ See, e.g., *Le Fevre v. Sullivan*, 785 F. Supp. 1402, 1407 (C.D. Cal. 1991) (DNA test results could not be used under state statute); *In re Estate of Rogers*, 583 A.2d 782, 783 (N.J. Super. Ct. App. Div. 1990) (deceased's ex-wife ordered to submit to DNA tests); *Id.* (exhumation for DNA testing ordered).

¹²² See *Batchelder v. Boyd*, 423 S.E.2d 810, 815 (N.C. Ct. App. 1992) (exhumation order for DNA testing upheld); *Alexander*, 537 N.E.2d at 1314 (exhumation ordered for DNA testing); *In re Estate of Greenwood*, 587 A.2d 749, 757 (Pa. Super. Ct. 1991) (administratrix ordered to release deceased's blood samples for DNA testing). But see *Le Fevre*, 785 F. Supp. at 1402 (DNA results inadmissible under statute requiring "open and notorious acknowledgment" as sole method of proof of paternity).

¹²³ See, e.g., *Tipps v. Metropolitan Life Ins. Co.*, 768 F. Supp. 577, 580 (S.D. Tex. 1991); *William M. v. Superior Court*, 275 Cal. Rptr. 103, 106 (Cal. Ct. App. 1990), *reh'g denied*, 1990 Cal. App. LEXIS 1322 (Cal. Ct. App. 1991), *review denied sub nom.* *Mohammed v. Superior Court of County of Sacramento*, 1991 Cal. LEXIS 1163 (Cal. 1991); *In re Estate of Sanders*, 3 Cal. Rptr. 2d 536, 539, 545 (Cal. Ct. App. 1992), *review denied sub nom.* *Estate of Sanders v. Sanders*, 1992 Cal. LEXIS 1623 (Cal. 1992); *Sudwischer v. Estate of Hoffpauir*, 589 So.2d 474, 476 (La. 1991), *cert. denied*, 112 S. Ct. 1937 (1992); *Rogers*, 583 A.2d at 782.

¹²⁴ See, e.g., *Tipps*, 768 F. Supp. at 580 (inherent power); *Sudwischer*, 589 So.2d at 476 (Lemmon, J. concurring) (statutory power); *Rogers*, 583 A.2d at 784 (inherent power).

¹²⁵ See, e.g., *William M.*, 275 Cal. Rptr. at 104-05 (statute only allows testing of mother, child

sion for several courts.¹²⁶ Some courts have ordered exhumations and the release of blood and tissue samples of the deceased so that DNA testing could be performed, noting that scientific advances have removed the problems of proof that long barred posthumous paternity actions.¹²⁷ At least one court, however, has found itself constrained from utilizing the power of DNA testing by statutes lacking provisions for its use in posthumous paternity cases.¹²⁸

1. Testing Allowed

In 1988, in *Alexander v. Alexander*, the Court of Common Pleas for Franklin County, Ohio upheld a probate court order for the exhumation of a putative father so that DNA paternity testing could be performed.¹²⁹ The plaintiff asked the court to order the exhumation of the deceased to allow DNA testing to establish that the deceased was the plaintiff's father.¹³⁰ The court noted that the accuracy and infallibility of DNA tests had removed the substantial problems of proof in posthumous paternity cases that had long served to deny illegitimate children equal inheritance rights.¹³¹ The court reasoned that it could no longer deny the opportunity to illegitimate children to prove their paternity and upheld an order for exhumation of the deceased's body for DNA testing.¹³²

Seeking a declaration that he was the deceased's sole heir, the plaintiff asked the deceased's relatives to sign an application for exhumation of the deceased so a DNA test could be performed to establish paternity.¹³³ When the relatives refused to sign the application, the plaintiff petitioned the probate court for an order to compel exhumation

and father to prove paternity); *Sanders*, 3 Cal. Rptr.2d at 539, 545 (statute provides exclusive methods for proving paternity).

¹²⁶ See, e.g., *Alexander*, 537 N.E.2d at 1311; *Greenwood*, 587 A.2d at 751.

¹²⁷ *Batchelder v. Boyd*, 423 S.E.2d 810, 815 (exhumation order upheld); *Alexander*, 537 N.E.2d at 1314 (exhumation ordered); *Greenwood*, 587 A.2d at 757 (samples ordered released).

¹²⁸ See *Le Fevre v. Sullivan*, 785 F. Supp. 1402, 1407.

¹²⁹ 537 N.E.2d 1310, 1314 (Franklin County, Ohio C.P. 1988), *dismissed as moot*, 560 N.E.2d 1337, 1339 (Ohio Ct. App. 1989) (plaintiff moved for dismissal during appeal after settlement was reached with estate of deceased putative father's uncle). Cf. *Will of Janis*, 600 N.Y.S.2d 416 (N.Y. Sur. Ct. 1993) (exhumation request by alleged nonmarital child denied based on lack of provision in law for genetic testing after putative father's death, public policy against exhumations and availability of "ample proof of the type customarily submitted to prove paternity").

¹³⁰ *Alexander*, 537 N.E.2d at 1311.

¹³¹ *Id.* at 1314.

¹³² *Id.*

¹³³ *Id.* at 1311. The deceased, David Summers, died destitute, but his estate was subject to a considerable inheritance from the estate of Summers' uncle, Alfred A. Adams. *Id.*

tion as part of civil discovery.¹³⁴ After a hearing, the probate court granted the plaintiff's motion and ordered the Union Cemetery Association to exhume the remains of the deceased.¹³⁵ The deceased's relatives appealed the order to the Franklin County Court of Common Pleas.¹³⁶

The *Alexander* court viewed the matter as one of first impression, involving developments in paternity testing methods used to establish the rights of an illegitimate child.¹³⁷ In reviewing the history of common law and statutory treatment of illegitimate children, the court noted that problems of proof had frequently deprived such children of the opportunity to prove paternity and to share in their fathers' estates.¹³⁸ The court found, however, that the accuracy and infallibility of DNA tests mitigated these evidentiary problems and that there was no longer any reason to deny illegitimate children the opportunity to prove paternity after their fathers' deaths, and to share in their fathers' estates.¹³⁹ Thus, the *Alexander* court upheld the order for exhumation so that posthumous DNA paternity tests could be performed.¹⁴⁰

Similarly, in 1991, in *In re Estate of Greenwood*, the Superior Court of Pennsylvania upheld an order of the Orphans' Court Division of the Court of Common Pleas of Greene County instructing the administratrix of the deceased putative father's estate to authorize the release of blood samples from the putative father held by a county coroner.¹⁴¹ The plaintiff had requested release of the samples for genetic testing to determine whether she was the deceased's daughter.¹⁴² The administratrix asserted that the plaintiff's claim was barred by a statute of

¹³⁴ *Id.*

¹³⁵ *Alexander*, 537 N.E.2d at 1311.

¹³⁶ *Id.*

¹³⁷ *Id.* The court took judicial notice of the accuracy of DNA tests in proving paternity. *Id.*

¹³⁸ *Id.* at 1311-14.

¹³⁹ *Id.* at 1311, 1314. The court reviewed United States Supreme Court and Ohio Supreme Court decisions concerning the inheritance rights of illegitimate children, noting that problems of proof in establishing paternity were often the basis for states' denying illegitimate children the right to inherit equally with their legitimate counterparts. *Id.* at 1314.

¹⁴⁰ *Alexander*, 537 N.E.2d at 1314. After reaching a settlement relative to the estate of the deceased's uncle, the plaintiff moved to dismiss his action seeking a determination that he was the deceased's sole heir. *Alexander v. Alexander*, 560 N.E.2d 1337, 1339 (Ohio Ct. App. 1989). The Court of Appeals of Ohio found that, once the Probate Court dismissed *Alexander's* case, the order to exhume was moot. *Id.* In a concurring opinion, one judge expressed concern that several issues of first impression were left unresolved, including a probate court's power to order exhumation, the nature of restrictions placed upon parentage determinations under Ohio law, and the restrictions on an illegitimate child's inheritance. *Id.* at 1339-40 (George, J., concurring).

¹⁴¹ 587 A.2d 749, 757 (Pa. Super. Ct. 1991).

¹⁴² *Greenwood*, 587 A.2d at 750.

limitations and by failure to comply with Pennsylvania's inheritance statutes.¹⁴³ The *Greenwood* court reviewed the language and intent of Pennsylvania's support and probate statutes, and reasoned that the legislature had intentionally not created a statute of limitations for paternity actions brought to determine the right to inherit.¹⁴⁴ Thus, the *Greenwood* court upheld the order directing the administratrix to release the blood samples of her deceased husband for testing.¹⁴⁵

In *Greenwood*, the plaintiff notified the deceased's estate that she was the deceased's illegitimate daughter and intended to claim an intestate share of the estate.¹⁴⁶ The administratrix, wife of the deceased, refused to accept the plaintiff's evidence, which included a birth certificate and affidavits of the decedent's family and friends attesting to the deceased's acknowledgment that he was the plaintiff's father.¹⁴⁷ The administratrix indicated the only evidence of paternity she would accept was proof through blood testing.¹⁴⁸

When the plaintiff discovered that the Allegheny County Coroner had blood and tissue samples of the decedent, the administratrix refused to authorize release of the samples for paternity testing.¹⁴⁹ After oral arguments, the orphans' court ordered the administratrix to authorize release of her husband's blood for genetic testing.¹⁵⁰ On appeal,

¹⁴³ *Id.*

¹⁴⁴ See *id.* at 751-54. The court first reviewed the development of laws regarding the right of illegitimate children to inherit, from the common law *filius nullius* doctrine to a more recent Pennsylvania law declaring a person born out of wedlock to be the "child of his mother but not of his father" for purposes of inheritance. *Id.* at 751. Pennsylvania law did not allow illegitimate children to inherit through or from their fathers until 1978. *Id.*

¹⁴⁵ *Id.* at 757.

¹⁴⁶ *Id.* at 750.

¹⁴⁷ *Greenwood*, 587 A.2d at 750.

¹⁴⁸ *Id.* Under Pennsylvania law, there are significant differences between the burden of proof for paternity actions for support and for intestate succession. *Id.* at 752, 754. The burden of proof for support actions is a "preponderance of the evidence." *Id.* at 754; 23 PA. CONS. STAT. ANN. § 4343(a) (1991). The standard for paternity actions to determine the right to inherit is "clear and convincing evidence" that the man was the father of the child. *Greenwood*, 587 A.2d at 752; 20 PA. CONS. STAT. ANN. § 2107(c) (1992).

¹⁴⁹ *Greenwood*, 587 A.2d at 750. The plaintiff indicated the administratrix was initially cooperative, but did not respond to requests to obtain samples from the coroner's office. *Id.* The coroner was holding the samples pending investigation into the cause of the deceased's death. *Id.*

¹⁵⁰ *Id.* The orphans' court and the *Greenwood* court both found the question of whether an orphans' court could order a blood test, at the request of an illegitimate child, after the death of the alleged father to be one of first impression. *Id.* at 751. It is unclear exactly what testing was to be performed. The orphans' court ordered the administratrix to "authorize release of the decedent's blood sample for genetic testing." *Id.* at 750. The *Greenwood* court discussed the exclusionary power of Human Leucocyte Antigen (HLA) tests at some length. *Id.* at 755-56. HLA

the administratrix challenged the lower court's authority to order such tests at the request of an illegitimate child after the death of the alleged father.¹⁵¹ She asserted that an eighteen-year statute of limitations under Pennsylvania's support statute barred the plaintiff from bringing the action and that the plaintiff failed to meet any of the conditions precedent to establishing her right to inherit as a child born out of wedlock.¹⁵²

The *Greenwood* court found that there was no statute of limitations for bringing a posthumous paternity action to determine rights of inheritance.¹⁵³ The court recognized that Pennsylvania's concern with accurate, efficient and final disposition of decedents' property might be jeopardized by posthumous paternity claims that were brought after long delay or with little proof.¹⁵⁴ The *Greenwood* court found that the case before it posed no such danger.¹⁵⁵ In addition, the court found genetic testing was one way of furthering the public policy of eliminating the stigma of illegitimacy.¹⁵⁶ The *Greenwood* court upheld the order instructing the administratrix to authorize the county coroner to relinquish the blood samples of her deceased husband for testing.¹⁵⁷

tests, however, cannot be performed on blood samples more than 24 hours old or that have been refrigerated. See Lake & Paulsen, *supra* note 7, at 43. DNA testing is the only scientific method able to provide "clear and convincing" proof of paternity from blood or tissue samples of a deceased putative father. See *id.* A local newspaper story indicated that DNA tests were to be performed. *Court Upholds Paternity Blood Test of Dead Man*, UPI, Mar. 18, 1991, available in LEXIS, Nexis Library, UPI File.

¹⁵¹ *Greenwood*, 587 A.2d at 751.

¹⁵² *Id.* at 750, 752.

¹⁵³ *Id.* at 752-54. A claimant must bring an action for support within 18 years of the birth of the child. *Id.* at 752; 23 PA. CONS. STAT. ANN. § 4343(b) (1991). Pennsylvania law allows children to inherit through or from their fathers under several circumstances, including where there is clear and convincing evidence that the man *was* the father of the child, which the court interpreted as evidencing legislative intent to allow posthumous paternity determinations. *Id.* at 751-52, 752 n.3 (emphasis added); 20 PA. CONS. STAT. ANN. § 2107 (1992).

¹⁵⁴ *Greenwood*, 587 A.2d at 756.

¹⁵⁵ *Id.* The plaintiff brought her action one month following the grant of Letters of Administration and provided considerable other evidence of paternity. *Id.* at 750, 757; *cf.* *Matthew for Butler v. Bowen*, 640 F. Supp. 886, 889 (E.D. Pa. 1986) (testimonial evidence by plaintiff, her daughter and decedent's brother did not achieve the level of strict proof required).

¹⁵⁶ *Greenwood*, 587 A.2d at 756. The court was particularly distressed by the fact that the administratrix's brief conceded the value of blood tests, yet sought to withhold permission for such tests to avoid having "clear and convincing" proof of paternity presented. *Id.* at 755-56. The court characterized her as saying: "I will withhold evidence that may prove potentially beneficial to the appellee and detrimental to me." *Id.* at 756. The court found that public policy was against allowing such behavior. *Id.*

¹⁵⁷ *Id.* at 757.

In 1992, the Court of Appeals of North Carolina also upheld an exhumation order for DNA testing to determine paternity in *Batcheldor v. Boyd*.¹⁵⁸ The defendant had sought an exhumation order so that DNA tests could be performed on the deceased to determine the relationship, if any, between himself and the deceased.¹⁵⁹ The court noted that DNA testing to determine parentage was established as a reliable process, recognized under North Carolina law, and applicable when the putative father is deceased.¹⁶⁰ The court dissolved a stay on exhumation, noting that further delay in exhuming the body could reduce the likelihood of obtaining satisfactory tissue samples.¹⁶¹

In *Batcheldor*, the defendant filed a complaint in superior court seeking to determine his inheritance rights.¹⁶² Plaintiffs, alleged heirs of the deceased, filed an action in superior court in response to the defendant's allegation that he was the deceased son and entitled to share in the estate.¹⁶³ This caused the defendant to file a motion to exhume the deceased's body for DNA testing to determine if there was a relationship between the two.¹⁶⁴ The defendant sought to prove two facts with such testing: that the man from whom his mother was separated when he was born was not his biological father, and that the deceased, whom his mother later married, was his father.¹⁶⁵ After extensive discovery, the trial court found that good cause had been shown to exhume the body of the deceased and ordered the requested exhumation and DNA testing.¹⁶⁶

¹⁵⁸ 423 S.E.2d 810, 815 (N.C. Ct. App. 1992), *writ denied, stay denied, review denied*, 426 S.E.2d 700 (N.C. 1993).

¹⁵⁹ *Batcheldor*, 423 S.E.2d at 811.

¹⁶⁰ *Id.* at 812.

¹⁶¹ *Id.* at 815.

¹⁶² *See id.* at 810.

¹⁶³ *See id.*

¹⁶⁴ *See Batcheldor*, 423 S.E.2d at 811.

¹⁶⁵ *See id.* at 813-14. The defendant was born on September 16, 1936 and no father's name was shown on his birth certificate. *Id.* at 811. At the time of the defendant's birth, his mother was separated from her husband, whom she married in August of 1935 and lived with until November 1935. *Id.* at 812. The deceased and the defendant's mother were married on December 22, 1940. *Id.* To inherit from the deceased's estate, the defendant first needed to overcome the presumption under North Carolina law that the child of a married woman is her husband's child. *Id.* at 813. This would make him illegitimate, as a "child born to a married woman, but begotten by one other than her husband." *Id.* Next, the defendant needed to show that he was fathered by the deceased. *Id.* at 814. His mother's subsequent marriage to the deceased would then make the defendant legitimate under North Carolina law, entitling him to inherit from the estate of the deceased. *Id.* at 813-14. DNA tests showing the defendant to be the son of the deceased would resolve both these issues at once. *See id.* at 814.

¹⁶⁶ *See id.* at 811-12. In addition to the facts outlined above, the defendant presented

The plaintiff and other alleged heirs of the deceased then obtained a stay of the exhumation order and appealed the superior court's decision to the Court of Appeals of North Carolina.¹⁶⁷ The court of appeals concluded that, with a proper foundation, DNA testing could determine both the defendant's original illegitimacy and his subsequent legitimation through the later marriage of his mother to the deceased.¹⁶⁸ The court reasoned that DNA tests were just the latest advance in the types of evidence that could be used to show illegitimacy or legitimacy.¹⁶⁹ The *Batcheldor* court adopted the lower court's reasoning that the just and orderly disposition of a decedent's property was a lawful state interest that outweighed the natural and proper respect for the dead, once buried.¹⁷⁰ Rejecting the argument that permitting exhumation would lead to a flood of similar petitions by would-be heirs, the *Batcheldor* court held that the defendant had presented substantial evidence to support his claim and that, in the face of such evidence, the "floodgate" argument should not deter the court from its search for the truth.¹⁷¹ The *Batcheldor* court upheld the trial court's exhumation order and dissolved the stay of exhumation.¹⁷²

Several courts have found that the potential of DNA testing justified ordering the testing of a deceased putative father's genetic material, through exhumation or the other sample sources.¹⁷³ They have reasoned that the accuracy and infallibility of the tests eliminate the problems of proof that traditionally accompanied posthumous paternity actions.¹⁷⁴ Additionally, the ability to make accurate posthumous determinations furthers the public policy of eliminating the stigma of illegitimacy.¹⁷⁵ Thus, these courts are ordering the DNA testing of

extensive evidence that the deceased had held him out to the community as his son and readily admitted his paternity, and that other family members considered him to be the deceased's son. *Id.* at 812.

¹⁶⁷ *Id.* at 812-13.

¹⁶⁸ *See id.* at 814.

¹⁶⁹ *See Batcheldor*, 423 S.E.2d 810, at 813-14. The court reviewed the use of evidence of impotency, racial differences, non-access and, finally, blood-grouping tests to show that a man cannot be the father of his wife's child. *Id.* at 813. The court then concluded that North Carolina law contemplated the advancement of scientific techniques and the use of new methods such as DNA testing. *Id.* at 814.

¹⁷⁰ *Id.* at 812.

¹⁷¹ *See id.* at 814.

¹⁷² *See id.* at 815.

¹⁷³ *Batcheldor*, 423 S.E.2d 810 at 813-14 (exhumation); *Alexander v. Alexander*, 537 N.E.2d 1310, 1314 (same); *In re Estate of Greenwood*, 587 A.2d 749, 757 (Pa. Super. Ct. 1991) (coroner's blood and tissue samples).

¹⁷⁴ *See, e.g., Batcheldor*, 423 S.E.2d at 814-15; *Alexander*, 537 A.2d at 1314.

¹⁷⁵ *Greenwood*, 587 A.2d at 756.

deceased putative fathers' genetic material as they would order living putative fathers to submit to blood tests.¹⁷⁶

2. Statute Bars Use of Testing

At least one court has been forced to disregard results of DNA tests performed prior to the putative father's death, because the tests did not meet a statute's narrowly drawn requirements for posthumous proof of paternity.¹⁷⁷ In 1991, in *Le Fevre v. Sullivan*, the United States District Court for the Central District of California found that DNA testing could not be used to establish the requisite parent-child relationship for benefits under the Social Security Act.¹⁷⁸ In support of her application for insurance benefits, the plaintiff submitted the results of DNA tests performed on the deceased prior to his death that showed he was the plaintiff's father.¹⁷⁹ The court reasoned that DNA testing that had shown the deceased to be the child's father might be relevant to a state paternity adjudication, but that it was not sufficient to establish the "openly held out" relationship required under the Social Security Act.¹⁸⁰ The court held the DNA results proving paternity were irrelevant to the case, and found paternity had not been established under California law.¹⁸¹

There was no provision in California law for the use of DNA testing to provide presumptive proof of paternity.¹⁸² The plaintiff's only

¹⁷⁶ *Batchelder*, 423 S.E.2d at 815; *Alexander*, 537 A.2d at 1314; *Greenwood*, 587 A.2d at 757.

¹⁷⁷ *Le Fevre v. Sullivan*, 785 F. Supp. 1402, 1407 (C.D. Cal. 1991).

¹⁷⁸ *Id.* An illegitimate child can establish entitlement to child's insurance benefits under the Social Security Act in several specific ways, one of which is to prove entitlement to inherit from the insured under the laws of the state of the insured's domicile. *Id.* at 1404 n.1; see 42 U.S.C. § 416(h)(2)(A)-(C) (1988). Paternity, and the right to Social Security benefits, also may be established where the insured and other parent entered into a marriage ceremony which, but for a legal impediment, would have been a valid marriage; where the deceased individual acknowledged paternity in writing; where a court decree found the insured to be the child's parent before the insured's death; where a court ordered the insured to contribute to the child's support because the insured was the child's parent; and where the insured was living with or contributing to the support of the child at the time of death and there is satisfactory evidence of paternity. 42 U.S.C. § 416(h)(2)(A)-(C) (1988).

¹⁷⁹ *Le Fevre*, 785 F. Supp. at 1404.

¹⁸⁰ *Id.* at 1407.

¹⁸¹ *Id.*

¹⁸² *Id.* at 1406. Under California law, a right to intestate succession depended upon the existence of a proven parent and child relationship. CAL. PROB. CODE § 6408 (West 1991). This parent and child relationship could be established by an un rebutted presumption of paternity. *Le Fevre*, 785 F. Supp. at 1405. Such a presumption could be established either by the father and mother having been married within 300 days before the child's birth or the parents making an attempt to marry in compliance with the law even if the marriage was invalid due to a technicality. *Id.* at 1405 n.3.

way to prove paternity was by showing by clear and convincing evidence that the putative father had openly held out the plaintiff as his child.¹⁸³ The court noted that the plaintiff could attempt to establish paternity in state court and that, if successful, this would entitle the child to insurance benefits under the Social Security Act.¹⁸⁴

B. Testing the Genetic Material of Collateral Parties

The issue of testing collateral parties, such as a deceased's wife and relatives, has presented courts with more complicated issues.¹⁸⁵ For example, the people needed for the tests have not always been parties to the paternity actions as a result of divorce or the deceased's lack of an estate.¹⁸⁶ Some courts have ordered collateral parties to be tested simply by exercising the courts' inherent powers.¹⁸⁷ Other courts have looked to statutes, such as civil discovery rules, for ways to justify and compel such testing.¹⁸⁸ Conversely, some courts have found that a state inheritance statute, written before the possibility of posthumous paternity proof was envisioned, effectively prevented them from ordering or using DNA test results.¹⁸⁹

1. Courts' Inherent Powers Allow Testing

In 1990, in *In re Estate of Rogers*, the Appellate Division of the Superior Court of New Jersey held that a trial court had the inherent power to order a nonparty to submit to blood tests to determine if her deceased ex-husband was the plaintiffs' father.¹⁹⁰ The deceased's ex-

¹⁸³ *Le Fevre*, 785 F. Supp. at 1406-07. Paternity actions were brought under California's adoption of the Uniform Parentage Act. *Id.* at 1405. Any court order establishing paternity after the putative father's death for intestate succession purposes, however, was required to be supported by clear and convincing evidence that the father had openly and notoriously held out the child as his own. *Id.* at 1406-07. The court found that statements by the deceased's widow, brother and cousin that the child was the deceased's were not clear and convincing evidence of paternity. *Id.* at 1403, 1407. The widow's statement was against interest because her child would have to share insurance benefits with any illegitimate child found eligible for benefits. *Id.* at 1403 n.5.

¹⁸⁴ *Le Fevre*, 785 F. Supp. at 1407.

¹⁸⁵ See, e.g., *William M. v. Superior Court*, 275 Cal. Rptr. 103, 107 (Ct. App. 1990) (putative grandparents could not be ordered to submit to tests); *In re Estate of Sanders*, 3 Cal. Rptr. 2d 536, 539, 545 (Ct. App. 1992) (legitimate children and their mothers could not be ordered to submit to tests); *Sudwischer v. Estate of Hoffpauir*, 589 So.2d 474, 476 (La. 1991) (legitimate daughter ordered to submit to tests); *In re Estate of Rogers*, 583 A.2d 782, 783-84 (N.J. Super. Ct. App. Div. 1990) (ex-wife ordered to submit to tests).

¹⁸⁶ See, e.g., *William M.*, 275 Cal. Rptr. at 104 (lack of estate); *Rogers*, 583 A.2d at 783 (divorce).

¹⁸⁷ See, e.g., *Rogers*, 583 A.2d at 784.

¹⁸⁸ See, e.g., *Sudwischer*, 589 So.2d at 475.

¹⁸⁹ See, e.g., *William M.*, 275 Cal. Rptr. at 105; *Sanders*, 3 Cal. Rptr. 2d at 539, 545.

¹⁹⁰ 583 A.2d 782, 783 (N.J. Super. Ct. App. Div. 1990).

wife, who was not a party to the paternity action, was ordered to submit to a DNA fingerprint blood test to establish whether the decedent was the plaintiffs' father.¹⁹¹ She refused to comply and the order was challenged on appeal.¹⁹² The *Rogers* court reasoned that, while New Jersey's version of the Parentage Act does not provide for the testing of someone in the ex-wife's position, the trial court had the inherent power to order anyone within its jurisdiction to submit to such tests when needed to adjudicate a genuine issue before it.¹⁹³ The court held the ex-wife could be ordered to submit to DNA blood testing.¹⁹⁴

In *Rogers*, four plaintiffs brought an action seeking to determine that the deceased was their father and that they were entitled to a share of his estate, which was resisted by the deceased's four children by marriage.¹⁹⁵ Conflicting testimonial evidence led the trial judge to comment that, although the evidence favored the plaintiffs' claim, "it can go either way."¹⁹⁶ The trial court then ordered the parties and their mothers, who had both testified, to submit to DNA fingerprint blood tests within fifteen days.¹⁹⁷ When the deceased's ex-wife refused to submit to blood tests, the court ordered her testimony stricken, but did not impose sanctions on her.¹⁹⁸ The trial court then found that paternity had been established and the deceased's children by marriage appealed.¹⁹⁹

On appeal, the *Rogers* court found there was no justification for a finding of paternity based on an adverse inference drawn against the defendants from the ex-wife's refusal to submit to blood tests.²⁰⁰ It noted that New Jersey law allowed a court to order the child, mother or alleged father to submit to blood or genetic tests, and that an

¹⁹¹ *Rogers*, 583 A.2d at 783. The ex-wife was not a party because she had no interest in the deceased's estate due to their divorce. *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 784.

¹⁹⁴ *Id.* at 784-85.

¹⁹⁵ *Id.* at 783.

¹⁹⁶ *Rogers*, 583 A.2d at 783. Plaintiffs were conceived after their mother had separated from her husband, and while the deceased was married to and living with his future ex-wife. *Id.* Because plaintiffs' mother was married when they were born, her husband was presumed to be their natural father and "clear and convincing evidence" was required to rebut that presumption. *Id.*

¹⁹⁷ *Rogers*, 583 A.2d at 783. Plaintiffs made a preliminary showing that the results of such tests would establish whether the deceased was their father. *Id.* The judge rejected exhumation of the deceased's body to obtain a tissue sample due to unchallenged evidence that the body was too decomposed for such testing. *Id.* at 783 n.2.

¹⁹⁸ *Id.* at 783.

¹⁹⁹ *Id.* at 783, 784.

²⁰⁰ *Id.* at 784. In a decision described by the *Rogers* court as "not clear," the trial court seemed to rest its paternity finding in part on an adverse inference it drew against the defendants from the ex-wife's refusal to submit to blood tests. *Id.* at 783-84.

adverse presumption could be drawn from refusal to submit to such tests.²⁰¹ The ex-wife, however, was not a party to the action—no party to the action had refused to submit to the tests.²⁰² The *Rogers* court held the trial court erred if it drew an inference adverse to the defendants from the ex-wife's refusal and remanded the matter to permit the trial court to clarify what it had done.²⁰³

The court also reasoned that, although the Parentage Act subjected only specified parties to court-ordered blood tests, a trial court was not helpless in dealing with a nonparty witness who refused to submit to blood or genetic tests.²⁰⁴ Noting that it is well within a trial court's "inherent power to call witnesses on its own initiative in the quest for the truth," the *Rogers* court reasoned that, if a court had the inherent power to require a nonparty to give testimony, it also had the power to require a nonparty to give evidence in the form of a blood sample.²⁰⁵ The court held the trial court had the inherent power to order the ex-wife to submit to blood tests, and to use contempt or other sanctions to coerce her compliance if it found the plaintiffs needed the blood test results to meet their burden of proof in the underlying paternity action.²⁰⁶

²⁰¹ *Id.* at 784.

²⁰² *Rogers*, 583 A.2d at 784.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* The court noted that forcing a putative father to give a blood sample implicated his Fourth Amendment right to be free from unreasonable searches and that there must be an articulable reason for suspecting the defendant is the father before such tests may be ordered. *Id.* at 784–85. The court found the evidence on the record provided articulable reasons for ordering the ex-wife to submit to blood testing. *Id.* at 785.

²⁰⁶ *Id.* at 785. The trial court's finding of paternity was reversed and remanded for proceedings consistent with the *Rogers* court opinion. *Id.* Conversely, in 1985, in *Hibbs v. Chandler*, the Kentucky Court of Appeals, the state's intermediate appellate court, held that the parents of the deceased putative father could be required under state law to submit to blood tests if they were parties to the paternity action, but not if they were merely witnesses. 684 S.W.2d 310, 313–14 (Ky. Ct. App. 1985). The deceased died intestate and no personal representative was ever appointed. *Id.* at 311. The paternity action was brought for the sole purpose of obtaining social security benefits on behalf of a child against the deceased's account. *Id.* Kentucky case law provided that an illegitimate child could inherit from an intestate father if paternity was proven by clear and convincing evidence. *Id.* at 312. Furthermore, a statute (later repealed) provided that heirs and devisees could be liable for debts and liabilities of the decedent as they would have been had property passed to them via a will. *Id.* at 313. The *Hibbs* court reasoned that the responsibilities inherent to paternity are "liabilities," and that the deceased's parents could be named as parties, provided they had received assets from the deceased upon his death. 684 S.W.2d at 313. Thus, the court said that if the deceased's parents were parties to the paternity action they could be compelled to submit to blood tests, but if they were merely witnesses they could not be so compelled. *Id.* The *Hibbs* court held that blood tests already taken could be used in any future trial, but that any order for requested additional HLA tests would depend upon whether the trial court found, on remand, that the deceased's parents were parties or witnesses. *Id.* at 313–14.

In 1991, in *Tipps v. Metropolitan Life Insurance Co.*, the United States District Court for the Southern District of Texas found DNA testing of living relatives provided the clear and convincing evidence required to rebut a presumption that a deceased man was the plaintiff's biological father.²⁰⁷ The plaintiff sought to maintain a presumption of paternity so her daughter would be entitled to benefits from a life insurance policy the deceased obtained as an employee of the United States Postal Service.²⁰⁸ The parties presented a variety of conflicting documentary and testamentary evidence on the parent and child relationship, or lack thereof, between the plaintiff and the deceased.²⁰⁹ The court reasoned that DNA evidence of non-paternity was more convincing than the other conflicting evidence offered in support of paternity.²¹⁰ The court held the presumption of paternity was overcome and the plaintiff was not entitled to benefits under the deceased's life insurance policy.²¹¹

Upon the death of the insured, the defendant insurance company deposited the deceased's life insurance proceeds with the district court so that a determination could be made as to the identity of the deceased's surviving children who were beneficiaries under the policy.²¹² The plaintiff provided various evidence that her child was the deceased's daughter, including a birth certificate and baptismal record listing the deceased as the child's father, testimony that the deceased had acknowledged paternity and evidence that the deceased had carried the plaintiff's daughter on his insurance policy until the plaintiff remarried.²¹³ Evidence against paternity included a divorce decree stating the plaintiff's son was the only child of the marriage between plaintiff and the deceased, the deceased's last will that designated the plaintiff's son as primary beneficiary and made no mention of the plaintiff's

²⁰⁷ 768 F. Supp. 577, 580 (S.D. Tex. 1991).

²⁰⁸ *Tipps*, 768 F. Supp. at 577-78. State law controlled the establishment of family relationships under Federal Employees Group Life Insurance policies. *Id.* at 579. Under Texas law, the plaintiff was presumed to be the deceased's daughter because she was born within 300 days of the termination by divorce of the marriage between her mother and the deceased. *Id.* at 579. This presumption could be rebutted only by clear and convincing evidence. *Id.*

²⁰⁹ *Id.* at 578.

²¹⁰ *Id.* at 578-80.

²¹¹ *Id.* at 580.

²¹² *Id.* at 578. The deceased was unmarried and had not designated any beneficiary for the policy at the time of his death. *Id.* at 577-78. Under federal law, his surviving children were entitled to the proceeds. *Id.* at 578. Determination of the identity of his children was controlled by local law, in this case the law of Texas. *Id.* at 579.

²¹³ *Tipps*, 768 F. Supp. at 578. The deceased also carried the plaintiff's son from a previous marriage on his insurance policy, and there was no indication this gratuitous act demonstrated any intent to adopt the child. *Id.*

daughter, and testimony that the deceased had not believed the plaintiff's daughter to be his child and that the plaintiff had named another man as the child's father.²¹⁴ The *Tipp*s court found the evidence neither rebutted nor conclusively determined that the deceased was the child's father.²¹⁵ It reasoned that without accurate, scientific paternity testing, the presumption of paternity would have been sustained based on the testimony and other evidence offered.²¹⁶

As the deceased provided no genetic material for the tests, determination of his biological relationship with the child was made by inference.²¹⁷ The DNA testing involved comparing blood samples from the child, the deceased's parents and a son born to the deceased and the plaintiff.²¹⁸ The comparison showed the child was only a half sibling of the deceased's son, that the son was biologically related to the deceased's parents, and that the child was not so related.²¹⁹ A genetic testing expert testified that these results were at least ninety-five percent conclusive, and probably ninety-nine percent conclusive that the deceased was not the father of the plaintiff's daughter.²²⁰ The *Tipp*s court found this clear and convincing evidence of non-paternity was sufficient to rebut the normal presumption and ordered that the plaintiff should receive no benefits from the deceased's policy.²²¹

Courts have found that DNA tests performed on the deceased putative father's relatives can determine paternity posthumously.²²² The DNA tests may result from a court's inherent power to compel the physical examination of witnesses, or from previously performed tests offered as evidence.²²³ Courts have recognized that DNA tests have the power to resolve cases in which there would otherwise be no clear result.²²⁴ Thus, some courts have found it in their inherent power to

²¹⁴ *Id.*

²¹⁵ *Id.* at 579.

²¹⁶ *Id.*

²¹⁷ *Id.* at 580.

²¹⁸ *Tipp*s, 768 F. Supp. at 578.

²¹⁹ *Id.*

²²⁰ *Id.* Evidence was presented showing the procedures used by Cellmark to collect and analyze the blood samples. *Id.* at 580. The plaintiff apparently refused to provide a blood sample, which would have enhanced the accuracy of the results. *Id.* The court reasoned that, after such a refusal, she should not be allowed to complain the test results were not accurate enough. *Id.*

²²¹ *Id.* at 580-81.

²²² See, e.g., *Tipp*s, 768 F. Supp. at 580-81; *In re Estate of Rogers*, 583 A.2d at 782-83.

²²³ See, e.g., *Hibbs v. Chandler*, 684 So.2d 310, 313-14 (Ky. Ct. App. 1985) (previously performed tests used to determine non-paternity); *Rogers*, 583 A.2d at 784 (ex-wife, non-party, ordered to submit to testing under court's inherent power).

²²⁴ See *Tipp*s, 768 F. Supp. at 579 (non-DNA evidence neither rebutted nor conclusively

acknowledge the accuracy and reliability of DNA tests in posthumous paternity determinations.²²⁵

2. A Statute Allowing a Court to Order Testing

At least one court has relied on civil discovery rules to hold that collateral parties could be ordered to submit to DNA testing.²²⁶ In 1991, the Supreme Court of Louisiana, in *Sudwischer v. Estate of Hoffpauir*, employed civil discovery rules to order the legitimate daughter of the deceased to submit to a blood test for DNA testing.²²⁷ The plaintiff sought to compel blood testing of the deceased's legitimate daughter to prove that the plaintiff was the deceased's daughter and thus was entitled to a share of the deceased's estate.²²⁸ The trial court denied the plaintiff's motion, finding Louisiana's paternity statute did not authorize blood tests of siblings, and the plaintiff appealed.²²⁹ On appeal, the *Sudwischer* court reasoned that, although not technically a party to the paternity suit, the deceased's legitimate daughter could be compelled to submit to a blood test under Louisiana's civil discovery rules.²³⁰ The *Sudwischer* court overturned the trial court and granted the motion to compel blood testing.²³¹

The *Sudwischer* court held that the trial court's denial of the plaintiff's motion was based on a statute directed at establishing paternity for support actions.²³² The court reasoned that this statute did not authorize blood tests of siblings because it presumed the existence of a living putative father.²³³ The statute did not express a deliberate policy of limitation on blood testing in other circumstances.²³⁴

The court then considered Louisiana's civil discovery rules, which provide for discovery of any non-privileged matter that is relevant to

established the presumption of paternity); *Rogers*, 583 A.2d at 783 ("it can go either way" without DNA tests).

²²⁵ See, e.g., *Tipps*, 768 F. Supp. at 580; *Rogers*, 583 A.2d at 783-84.

²²⁶ *Sudwischer v. Estate of Hoffpauir*, 589 So.2d 474, 475-76 (La. 1991).

²²⁷ *Id.* at 476. The plaintiff introduced evidence that DNA testing of herself, her mother's other children, and the decedent's legitimate daughter would establish the probability of relationship between plaintiff and the illegitimate daughter. *Id.* at 475. Plaintiff's expert witness testified that testing of the decedent's tissue was not feasible. *Id.* Plaintiff's siblings were alleged to have agreed to be tested. *Id.*

²²⁸ *Id.* at 474, 476.

²²⁹ *Id.* at 474. The statute, directed at establishing paternity for purposes of child support, did not contemplate a deceased putative father. *Id.* at 474-75.

²³⁰ *Id.* at 475-76.

²³¹ *Sudwischer*, 589 So.2d at 476.

²³² *Id.* at 474-75.

²³³ See *id.*

²³⁴ *Id.* at 475.

the subject matter.²³⁵ The court held that, although not originally a party to the probate action, the deceased's legitimate daughter was a forced heir to the deceased's estate and had acted through the estate's attorney in opposing the testing.²³⁶ The court held that the deceased's legitimate daughter could be compelled to submit to DNA-based blood testing under Louisiana's civil discovery rules.²³⁷

The *Sudwischer* court also held that a balancing of constitutional rights favored such testing.²³⁸ It reasoned that, although the state's interest in the orderly disposition of estates may bar paternity claims after estate distribution, no such concern existed where the deceased's estate was under administration and the illegitimate daughter's claim was timely.²³⁹ The court said that the plaintiff had a constitutional right to prove filiation to a deceased father, as well as an overriding emotional and financial interest in knowing her father's identity.²⁴⁰ The court weighed this right against the invasion of the legitimate daughter's privacy that would result from a compelled blood drawing and her financial interest in opposing paternity claims and found the balance in favor of the illegitimate daughter.²⁴¹ Based on the constitutional balance and the state's rules of discovery, the court granted the motion to compel DNA testing of the legitimate daughter's blood.²⁴²

²³⁵ *Id.*

²³⁶ *Sudwischer*, 589 So.2d at 475. Although the estate, not the legitimate daughter, was technically the party to the probate proceeding, there appeared little doubt the legitimate daughter was resisting the plaintiff's claims and had a substantial interest in not sharing the deceased's estate valued at \$2,000,000. *Id.* at 477 n.2 (Lemmon, J., concurring).

²³⁷ *Id.* at 476.

²³⁸ *Id.* at 475-76.

²³⁹ *Id.*

²⁴⁰ *Id.* at 476; see also *Trimble v. Gordon*, 430 U.S. 762, 764-65, 776 (1977).

²⁴¹ *Sudwischer*, 589 So.2d at 476. The legitimate daughter raised no claims of physical danger or religious belief in opposition to the blood testing. *Id.* Thus, the court found the invasion to the legitimate daughter's privacy was minimal, and that she had the alternative of conceding her father's paternity of the plaintiff. *Id.* In a dissenting opinion, Justice Dennis stated that the illegitimate daughter had no constitutional rights to balance against those of the legitimate daughter because no statute infringed impermissibly on her right to pursue a claim of legitimacy and there had been no affirmative state action to interfere with her right of equal protection of the law. *Id.* at 478 (Dennis, J., dissenting). He argued that, as the legitimate daughter fell outside the express terms of the blood testing statute and was not a party to the paternity action, the state had a limited and minimal interest in compelling a blood test. *Id.* Justice Dennis felt this interest was insufficient to justify an order compelling blood testing, when balanced against the legitimate daughter's privacy interest. *Id.* Justice Dennis further argued that the state interest in discouraging multiple paternity actions, especially those brought solely for inheritance rights, was an additional reason against ordering blood testing. *Id.* at 478-79.

²⁴² *Id.* at 476.

3. Statutes Barring Use of Testing

On the other hand, some courts have found that a state statute barred DNA testing of collateral heirs.²⁴³ For example, in 1990, in *William M. v. Superior Court*, the California Court of Appeal for the Third District held that the parents of the putative father could not be ordered to submit to blood tests to determine whether their deceased son was the father of the plaintiff's child.²⁴⁴ The trial court, citing its inherent power, had granted the plaintiff's request for an order compelling the deceased's parents to submit to blood tests and the parents appealed.²⁴⁵ The *William M.* court reasoned that neither the rules of evidence that permitted blood tests to determine paternity, nor the civil discovery provisions permitting physical examination of parties, authorized the testing of the putative father's parents.²⁴⁶ It vacated the lower court's order compelling the parents of the deceased to submit to blood tests.²⁴⁷

Dana F., the plaintiff in the original action, argued that California's Evidence Code, which permitted a court to order the mother, child and alleged father to submit to blood tests, did not prohibit a trial court from ordering other parties to submit to blood tests.²⁴⁸ The *William M.* court held that, given the invasion of privacy caused by compelled blood tests, the language of the evidence code expressed a deliberate policy of limitation on the ordering of blood tests.²⁴⁹ The court held that the evidence code did not authorize a trial court to order putative grandparents to submit to blood tests.²⁵⁰

The plaintiff also argued that California's Code of Civil Procedure authorized the physical or mental examination of a party to the action,

²⁴³ See, e.g., *William M. v. Superior Court*, 275 Cal. Rptr. 103, 107 (Ct. App. 1990) (putative grandparents could not be tested); *In re Sanders*, 3 Cal. Rptr. 2d 536, 539, 545 (Ct. App. 1992) (legitimate children and their mothers could not be tested).

²⁴⁴ 275 Cal. Rptr. 103, 107 (Cal. Ct. App. 1990). The real party in interest was Dana F., the mother of a child born on June 6, 1986, who had obtained a court order instructing William and Bonnie M. to submit to testing. *Id.* at 104. The mother claimed the deceased was the child's father, although when the deceased died in December 1986, six months after the child's birth, he had not married the plaintiff nor legitimated the child. *Id.*

²⁴⁵ *William M.*, 275 Cal. Rptr. at 104. The court did not indicate what type of blood tests were to be performed. See *id.* Either HLA or DNA testing could have been used to compare samples taken from living child, mother and putative grandparents. See *supra*, Section II for a discussion of the different methods of paternity testing.

²⁴⁶ *Id.* at 104-05.

²⁴⁷ *Id.* at 107.

²⁴⁸ *Id.* at 104.

²⁴⁹ *Id.* at 105.

²⁵⁰ *William M.*, 275 Cal. Rptr. at 105.

at the plaintiff's request.²⁵¹ The issue before the court was whether the parents of the deceased were parties to the action under the California Civil Code.²⁵² The court concluded the alleged paternal grandparents were not proper parties to a paternity action, either in their individual capacity or as parents of the deceased putative father.²⁵³ Hence, the *William M.* court held that civil discovery rules did not authorize a trial court to order grandparents to submit to blood tests.²⁵⁴

Following its statutory analysis, the *William M.* court expressed concern over the possible repercussions of allowing putative grandparents to be ordered to submit to blood tests in paternity actions.²⁵⁵ The court reasoned that allowing such suits could result in similar suits to test brothers, sisters, cousins or other relatives of the deceased putative father, where his parents were no longer living.²⁵⁶ The court noted that Minnesota was the only state with a statute allowing trial courts to order testing of the decedent's relatives.²⁵⁷ The *William M.* court then held that any decision to extend the list of parties who could be ordered to submit to blood testing in paternity actions must be made by the legislature.²⁵⁸

In 1990, the Supreme Court of South Dakota, in *In re Estate of Erbe*, held that because state law made no provision for proving paternity after the putative father's death, the court did not need to address the ordering of blood tests to establish an illegitimate child's heirship.²⁵⁹ Although the court did not indicate what type of blood testing

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* The court interpreted the California Civil Code to mean the only people who are proper defendant parties to a paternity action are the mother, child and any person presumed or alleged to be the father. *Id.*

²⁵⁴ *Id.* at 107. The court held that it was not a denial of due process and equal protection for the law to allow putative grandparents to bring a paternity action while precluding the mother from asserting her own paternity action against the putative grandparents, as the parties were not similarly situated. *Id.* at 105-06. Putative grandparents had an interest in establishing a legal relationship with a child allegedly fathered by their deceased son, and would have limited entitlement to seek visitation rights with their grandchildren under California law. *Id.* at 106. Conversely, the grandparents have no legal responsibility for the support or rearing of the child. *Id.* Thus, there are no rights in the child that can be enforced directly against the grandparents. *Id.* Therefore, the court found that it was reasonable for the legislature to have declined to make putative grandparents subject to suit as defendants in a paternity action, given that their interest in the question is not mandatory. *Id.*

²⁵⁵ *William M.*, 275 Cal. Rptr. at 106.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 106 n.5. See *supra* notes 51-64 and accompanying text for a discussion of the Minnesota statute.

²⁵⁸ *William M.*, 275 Cal. Rptr. at 106.

²⁵⁹ 457 N.W.2d 867, 868-69 (S.D. 1990). The court never indicated whom the plaintiff wanted

the plaintiff sought, the dissenting opinion's reasoning relied heavily on the accuracy of DNA testing.²⁶⁰ South Dakota law required the father's signed, witnessed writing acknowledging paternity before an illegitimate child could become an heir of his or her father.²⁶¹ South Dakota had no provisions for determination of paternity after the father's death.²⁶² The *Erbe* court acknowledged that the law operated unfairly as applied to individuals who would otherwise be able to establish a relationship to their deceased fathers, but reasoned that the statute's rational relationship to legitimate state interests justified the denial of the right to prove paternity after the father's death.²⁶³ The court held there was no way for an illegitimate child to become legitimated after his or her father's death, and that the court had no authority to order blood tests to prove paternity.²⁶⁴

Chief Justice Wuest, in his dissenting opinion, declared it offensive to his sense of justice that an illegitimate child could not inherit from his or her father unless explicitly acknowledged by the father.²⁶⁵ He argued the state's interest in the orderly disposition of property could be preserved merely by imposing a higher burden of proof on posthumous paternity proceedings, noting that other jurisdictions allow illegitimate children to prove the paternity of a deceased putative father by clear and convincing evidence.²⁶⁶ He further observed that genetic testing to prove paternity had been found reliable by many courts, including the Ohio trial court in *Alexander v. Alexander*, which ordered exhumation of the putative father so DNA tests could be performed.²⁶⁷ Chief Justice Wuest reasoned that these facts made the South Dakota

to have tested, but the only likely parties mentioned are the deceased's two surviving sisters and the plaintiff's mother. See *id.* at 867-68.

²⁶⁰ *Id.* at 872 (Wuest, C.J., dissenting).

²⁶¹ *Id.* at 869. In South Dakota, an illegitimate child was always an heir to his or her mother, and shared equally with her legitimate children in inheriting from her kindred. *Id.* An illegitimate child, nevertheless, did not inherit from the estate of his or her father's unless the parents married and the father acknowledged paternity or adopted the child. *Id.*

²⁶² See *id.* at 871 (Wuest, C.J., dissenting).

²⁶³ *Id.* at 869-70. The court found the statute served state interests by protecting the sanctity of a will and providing for the orderly settlement of estates. *Id.* at 869. The court reasoned that the statute did not distinguish between legitimates and illegitimates, but between categories of illegitimates. *Id.* at 870. The court further reasoned that problems of proof in posthumous claims of paternity justified the requirement for such documentary evidence signed by the putative father. *Id.* The court found the statute "carefully tuned" to state interests and, therefore, not a violation of equal protection. *Id.* at 869-70.

²⁶⁴ See *Erbe*, 457 N.W.2d at 868, 871.

²⁶⁵ *Id.* at 871 (Wuest, C.J., dissenting).

²⁶⁶ *Id.* at 872 (Wuest, C.J., dissenting).

²⁶⁷ *Id.* at 872; see also *Alexander v. Alexander*, 537 N.E.2d 1310, 1314 (Franklin County, Ohio C.P. 1988).

statute's denial to the plaintiff of any opportunity to inherit from the deceased, because he had never been acknowledged by the deceased, unconstitutional as applied to the plaintiff and other persons similarly situated.²⁶⁸ He would have permitted the plaintiff to maintain the action, with the requirement that paternity be proved by clear and convincing evidence with DNA testing or other means.²⁶⁹

Subsequently, in 1992, in *In re Estate of Sanders*, the California Court of Appeal for the Fourth District held that a putative father's children and their mothers could not be ordered to provide blood samples for DNA testing.²⁷⁰ The plaintiff had asked the probate court to order DNA tests of the deceased's relatives to verify her claim that she was the deceased's natural daughter and entitled to a portion of his estate as a pretermitted heir.²⁷¹ The plaintiff offered proof the deceased had acknowledged paternity, but not that he had "openly and notoriously" held her out to be his child, as required by statute.²⁷² The court held the plaintiff failed to meet the requirements for posthumous paternity determination, and upheld the probate court's denial of the plaintiff's request for DNA tests.²⁷³

Citing *William M. v. Superior Court*, the *Sanders* court first held that the probate court lacked the authority to order the mothers of the deceased's surviving children to give blood samples for DNA testing.²⁷⁴ The *Sanders* court then held that there were no provisions of law to support the requested DNA tests of the deceased's other children.²⁷⁵ The court first considered the California Probate Code that provides for a natural parent and child relationship to be proven under the Uniform Parentage Act, but that the relationship may not be established unless either a court order declaring paternity was entered

²⁶⁸ *Erbe*, 457 N.W.2d at 871 (Wuest, C.J., dissenting).

²⁶⁹ *Id.* at 872 (Wuest, C.J., dissenting).

²⁷⁰ 3 Cal. Rptr. 2d 536, 539, 545 (Ct. App. 1992). The plaintiff made two proposals, one to test the putative father's legitimate children and their mothers, and a second that did not involve testing the children's mothers. *Id.* at 539. The court considered both proposals, and found neither was authorized under California law. *Id.* at 540, 545. The mothers were not parties to the probate proceedings, as they were both divorced from the deceased and not named in his will, which bequeathed all of his property in equal shares to his three legitimate children. *Id.* at 537, 539.

²⁷¹ *Id.* at 537-39. The plaintiff did not formally request DNA testing, but her pleadings prayed for "subsequent discovery orders necessary to prove . . . paternity," and included declarations by two DNA experts. *Id.* at 539 n.5. The *Sanders* court inferred from the record before it that the plaintiff had, in fact, requested that the discussed DNA tests be ordered. *Id.*

²⁷² *Id.* at 538, 541.

²⁷³ *Id.* at 538, 541, 546.

²⁷⁴ *Id.* at 539.

²⁷⁵ *Sanders*, 3 Cal. Rptr. 2d at 540.

during the father's lifetime or paternity was established by clear and convincing evidence that the father has openly and notoriously held out the child as his own.²⁷⁶ As originally introduced, the legislation included explicit language endorsing the use of other methods to determine paternity, but this language was removed before the section was enacted.²⁷⁷ The court concluded the act should not be construed to include the omitted methods such as genetic testing.²⁷⁸ The court held that, despite advances in DNA technology, the law provided no method for the deceased's paternity to be determined after his death.²⁷⁹

The plaintiff argued that advances in genetic testing rendered the court's construction of the probate code obsolete because these advancements had removed the problems of uncertainty of proving paternity in probate proceedings that had been the justification for the statute.²⁸⁰ The *Sanders* court recognized that DNA testing had removed this uncertainty.²⁸¹ The court reasoned, however, that it could not consider such scientific advances absent legislative action.²⁸² The court thus held that any reexamination of the law based on scientific advances must come from the legislature, rather than from the courts sitting as super-legislatures to determine the wisdom of statutes.²⁸³

²⁷⁶ *Id.* at 540; CAL. PROB. CODE § 6408 (West 1991).

²⁷⁷ *Id.* at 541-42. The original version included the statement that, "Nothing in this subdivision limits the methods by which the relationship of parent and child may be established." *Id.* at 542. This made it "clear that the parent and child relationship may be established in such other proceedings as a child support action." *Id.* The court also noted that the legislature had revisited the section three times since its adoption without altering its position on the issue. *Id.* at 543.

²⁷⁸ *Id.* at 543.

²⁷⁹ *Id.* at 544, 546.

²⁸⁰ *Sanders*, 3 Cal. Rptr. 2d. at 544.

²⁸¹ *Id.* The court noted the author of the legislation had indicated the restrictive language's purpose was "to discourage dubious paternity claims from being made after the father's death for the sole purpose of inheritance." *Id.* at 543 n.15.

²⁸² *Id.* at 544. "While perhaps only the proverbial ostrich with its head in the sand would dispute the fact remarkable progress has been made in these areas in recent years, we need not dwell on these advances [in DNA based paternity testing]." *Id.* At the time of the *Sanders* case, a petition for review had been filed with the Supreme Court of California on the first published California opinion validating DNA testing under the *Kelly-Frye* test, which requires that scientific methods offered as evidence be generally accepted in the relevant scientific community. *Id.* at 544 n.18; see *California v. Axell*, 1 Cal. Rptr. 2d 411, 421-27 (Ct. App. 1991) (murder case). The petition for review was heard on January 30, 1992, 23 days after the *Sanders* case was heard. *Sanders*, 3 Cal. Rptr. 2d. at 545 n.*.

²⁸³ *Sanders*, 3 Cal. Rptr. 2d at 544. The court further held that the statute did not violate the principle of equal protection, although it effectively barred any posthumous determination in the case before the court. *Id.* at 544-45. It noted the Supreme Court had upheld a more restrictive statute in 1978, citing *Lalli v. Lalli*. *Id.* at 545 & n.19; see *supra*, note 76 and accompanying text for a discussion of *Lalli*. The *Sanders* court again noted that any lifting of restrictions or reevaluation of the law in light of scientific advances was better made by the legislature. 3 Cal. Rptr. 2d at 545.

Some courts have held that narrowly drawn statutes prevented them from acknowledging the potential of DNA testing in posthumous paternity determinations.²⁸⁴ Restrictions on bringing posthumous paternity actions, on what evidence may be offered and on who may be made parties to such actions have all served to deny trial courts the ability to consider DNA tests in posthumous paternity actions.²⁸⁵ At least two courts have called for legislative, rather than judicial, reexamination of statutes in light of advances in paternity testing.²⁸⁶ Thus, these courts have found that current statutes prevented them from using the power of DNA testing of the deceased's relatives in posthumous paternity actions.²⁸⁷

IV. TECHNOLOGICAL ADVANCEMENTS MANDATE LEGISLATIVE CHANGE

There is no longer any rational justification for blanket restrictions on the right of illegitimate children to bring posthumous paternity claims.²⁸⁸ The United States Supreme Court and societal changes have eliminated the justifications based on issues of perceived morality or protection of family values.²⁸⁹ The accuracy of DNA technology has eliminated the justifications of problems of proof and fear of fraudulent claims.²⁹⁰ It is time for the law and the courts to respond to the power of DNA testing by giving illegitimate children a general right to bring posthumous paternity claims.²⁹¹

Discouraging behavior viewed as immoral and protecting the family served as justifications to prevent or severely restrict paternity claims, especially those brought after the putative father's death.²⁹² The United States Supreme Court has held, however, that discouraging immoral

²⁸⁴ See, e.g., *William M.*, 275 Cal. Rptr. at 104-05; *Sanders*, 3 Cal. Rptr. 2d at 541; *In re Estate of Erbe*, 457 N.W.2d at 869-71.

²⁸⁵ See, e.g., *William M.*, 275 Cal. Rptr. at 104-05 (evidence code limited to testing mother, father, and child; civil discovery code limited to ordering physical examination of parties); *Sanders*, 3 Cal. Rptr. 2d at 539-41 (deceased's relatives could not be made parties; action did not meet narrow requirements for posthumous determination); *Erbe*, 457 N.W.2d at 871 (posthumous actions not allowed for intestate succession purposes).

²⁸⁶ *William M.*, 275 Cal. Rptr. at 106; *Sanders*, 3 Cal. Rptr. 2d at 544-45.

²⁸⁷ See *William M.*, 275 Cal. Rptr. at 106-07; *Sanders*, 3 Cal. Rptr. 2d at 539, 545; *Erbe*, 457 N.W.2d at 868, 871.

²⁸⁸ See *Alexander v. Alexander*, 537 N.E.2d 1310, 1314 (Franklin County, Ohio C.P. 1988).

²⁸⁹ See *supra* notes 66-74 and accompanying text for a discussion of the elimination of these justifications.

²⁹⁰ See *supra* Section II for a discussion of the accuracy of DNA based paternity testing and its usefulness in posthumous paternity cases.

²⁹¹ See *infra* Section IV.D for proposed changes to the Uniform Parentage Act and Uniform Act on Paternity.

²⁹² See *supra* notes 66-74 and accompanying text for an explanation of these justifications.

behavior in their parents is an unacceptable justification for statutory discrimination against illegitimate children.²⁹³ Protection of families by conserving the father's wealth and sparing his wife from having to acknowledge her husband's other children fails as a justification for discrimination against illegitimate children in modern society.²⁹⁴ With increasingly common second marriages and alimony payments to previous wives, and stepchildren increasingly counted as members of family units, there can be no justification for discrimination against illegitimate children as a way of preserving the traditional family structure.²⁹⁵ The only remaining justification for discrimination against illegitimate children bringing posthumous paternity actions has been the problem of proof.

The accuracy of DNA-based paternity testing has rendered obsolete the use of problems of proof and fear of fraudulent claims as justifications for restricting the right of illegitimate children to bring posthumous paternity claims.²⁹⁶ DNA-based tests make it possible, for the first time, to determine paternity accurately long after the putative father's death.²⁹⁷ Although problems with sample degradation or unavailability may prevent the use of DNA tests in some paternity cases, the fact that a method is not always available should not deny its use in cases where it has the power to offer probative, if not conclusive, evidence. DNA testing promises to replace the conflicting testimony and inconclusive evidence of paternity trials with settlement conferences that leave little to argue over other than whether the testing was performed properly and what the plaintiff will receive.²⁹⁸ All that remains is for the law and the courts to incorporate the accuracy of this new method into their responses to illegitimate children seeking to bring posthumous paternity claims.

A. *Testing the Putative Father*

The inadequacies of older testing methods when the putative father was deceased previously reduced posthumous paternity suits to little more than swearing contests, in which the alleged father was unable to participate.²⁹⁹ To avoid these problems of proof, many states

²⁹³ *Trimble v. Gordon*, 430 U.S. 762, 768 & n.13, 776 (1977); *Levy v. Louisiana*, 391 U.S. 68, 70-72 (1968).

²⁹⁴ See Krause, *supra* note 31, at 492-94.

²⁹⁵ See *id.*

²⁹⁶ *Alexander v. Alexander*, 537 N.E.2d 1310, 1314 (Franklin County, Ohio C.P. 1988).

²⁹⁷ See *supra* notes 113-19 and accompanying text.

²⁹⁸ See Longobardi, *supra* note 115, at 351.

²⁹⁹ See *Alexander*, 537 N.E.2d at 1314.

required public acknowledgment by the father before an illegitimate child could inherit by intestate succession.³⁰⁰ The law has steadily advanced, however, toward affording equal protection and equal rights to illegitimate children.³⁰¹ For example, the United States Supreme Court has found that scientific advances in blood-based non-DNA paternity testing of living putative fathers may mandate the removal of statutory limitations on paternity actions.³⁰² The Court reasoned that advances in blood testing rendered more attenuated the relationship between restrictions on paternity claims and a state's interest in preventing the prosecution of fraudulent paternity claims.³⁰³ Because DNA testing offers posthumous results more accurate than those available from blood tests on living putative fathers at the time of the Court's decisions, it is time to extend the Court's reasoning to posthumous paternity claims and allow illegitimate children to bring posthumous paternity actions based on the genetic evidence of DNA tests.³⁰⁴

Testing the genetic material of deceased putative fathers is easily justified. These men could have been compelled to submit to DNA tests while they were still alive; their estates and the law should not be allowed to refuse such testing after their deaths.³⁰⁵ Inconvenience involved in exhuming the deceased or collecting samples prior to burial should not deprive illegitimate children of the right to establish paternity and their resulting rights to inheritance and various other benefits.³⁰⁶ Despite the power of DNA testing, some states still do not allow posthumous determinations of paternity based on scientific fact, but continue to require that the putative father have taken affirmative action to recognize paternity during his lifetime.³⁰⁷ There is no valid justification for the restrictions on DNA testing that still exist, given our current ability to make accurate posthumous paternity determinations. The law and the courts must recognize the accuracy of DNA testing,

³⁰⁰ See *id.* at 1312; see *supra* note 43 for examples of restrictions imposed on posthumous paternity actions.

³⁰¹ See Longobardi, *supra* note 115, at 351.

³⁰² *Clark v. Jeter*, 486 U.S. 456, 463 (1988); *Pickett v. Brown*, 462 U.S. 1, 17-18 (1983).

³⁰³ *Pickett*, 462 U.S. at 17.

³⁰⁴ See *supra* notes 89 and 94-95 for a comparison of the accuracy of various testing methods.

³⁰⁵ See, e.g., UNIFORM PARENTAGE ACT § 11 (1973) ("The court may, and upon request of a party shall, require the . . . alleged father to submit to blood tests"); UNIFORM ACT ON PATERNITY § 7 (1960) ("The court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party . . . shall order . . . the alleged father to submit to blood tests.").

³⁰⁶ See, e.g., *Alexander*, 537 N.E.2d at 1311, 1314; *In re Estate of Greenwood*, 587 A.2d 749, 750, 757 (Pa. Super. Ct. 1991).

³⁰⁷ See *Inheritance Rights*, *supra* note 33, at 188 & n.118.

even after the putative father's death, and endorse the technique as a method of proving paternity before or after the putative father's death.³⁰⁸

B. Testing Collateral Parties

Testing collateral persons, such as blood relatives and wives, presents more complicated issues. Traditionally, the mother, child and putative father are parties to a paternity action and can be ordered to submit to testing.³⁰⁹ Even when other relatives are parties to paternity actions, for example, as personal representatives of deceased fathers for estate purposes, there are often other people needed for testing who are not parties to the action.³¹⁰ Some courts have responded to this situation by compelling collateral persons to submit to DNA tests, relying on the courts' inherent powers or on civil discovery rules, while other courts have found themselves blocked by statutes from testing collateral persons.³¹¹

It is easier to justify the compelled testing of collateral persons when the deceased's estate is at question and the collateral persons are beneficiaries under the estate.³¹² By refusing to accede to DNA tests, collateral persons withhold evidence that is highly probative and often determinative.³¹³ Equity demands that those seeking to profit from a denial of paternity not be allowed to withhold crucial evidence that could prove paternity.³¹⁴

³⁰⁸ See *Alexander*, 537 N.E.2d at 1314.

³⁰⁹ See, e.g., UNIFORM PARENTAGE ACT § 9 (1973) ("The child shall be made a party to the action. . . . The natural mother, each man presumed to be the father . . . and each man alleged to be the natural father shall be made parties. . . .").

³¹⁰ See, e.g., *In re Estate of Sanders*, 3 Cal. Rptr. 2d 536, 539, 545 (Ct. App. 1992); *Sudwischer v. Estate of Hoffpauir*, 589 So.2d 474, 475 (La. 1991); *Voss v. Duerschel*, 425 N.W.2d 828, 829, 831 (Minn. 1988); *In re Estate of Rogers*, 583 A.2d 782, 783 (N.J. Super. Ct. App. Div. 1990).

³¹¹ See, e.g., *William M. v. Superior Court*, 275 Cal. Rptr. 103, 105 (Ct. App. 1990) (evidence code and civil discovery rules prevented court from ordering testing); *Sudwischer*, 589 So.2d at 475-76 (civil discovery rules used to order testing); *Rogers*, 583 A.2d at 784-85 (inherent powers used to order testing). The Federal Rules of Civil Procedure do not allow a court to make such an order. See FED. R. CIV. P. 35. Their provisions only provide for the examination of the physical condition (including blood group) of parties and persons under the custody or control of parties. FED. R. CIV. P. 35(a). Furthermore, the section's use of the phrase "blood group" could be interpreted as limiting other types of blood-based testing including DNA fingerprinting. See *id.*

³¹² See, e.g., *Sudwischer*, 589 So.2d at 477 n.2 (Lemmon, J., concurring) (deceased's daughter, not a party to proceeding ordered to submit to blood testing to determine if plaintiff had legitimate claim to portion of \$2,000,000 estate).

³¹³ *Id.* at 475.

³¹⁴ See *In re Estate of Greenwood*, 587 A.2d 749, 755-56 (Pa. Super. Ct. 1991).

The deceased's relatives could defeat this demand for equity, however, by ceasing to be beneficiaries of the deceased's estate. The deceased's wife could disclaim any devises or bequests made to her, or her intestate share, thereby ceasing to be a party to the probate action.³¹⁵ Conversely, the deceased's children could disclaim their shares and cease to be parties to any probate action, increasing the share the deceased's wife would take.³¹⁶ The deceased's wife could then make gifts to the children to achieve distribution results similar to what would have happened had the children taken under a will or by intestate succession. Either method would transform individuals essential to DNA testing from collateral parties to the underlying probate action into nonparties. Collateral persons needed for DNA testing could cease to be parties while still benefiting from the deceased's wealth, undercutting equity's demand that they consent to DNA testing.

A different justification is required to compel collateral persons to submit to DNA tests when there is no estate, or when persons who are not beneficiaries of an estate are needed for testing.³¹⁷ The invasion of collateral persons' privacy caused by the DNA testing must be balanced against the illegitimate child's interest in proving paternity.³¹⁸ A collateral person may suffer two invasions: that of a needle for collection of a blood sample, and that of acknowledgment that a deceased relative fathered an illegitimate child. Collection of a blood sample is a *de minimis* and momentary invasion, absent any claim of physical danger or religious belief in opposition to blood testing.³¹⁹ Some state courts have reached this conclusion when considering the collection of blood samples from collateral parties for DNA tests to prove paternity.³²⁰ Often, a collateral person has the option of conceding paternity, thereby nullifying the need to give a blood sample.³²¹ The fact that paternity is an adjudicable matter that becomes part of the public

³¹⁵ 6 WILLIAM J. BOWE & DOUGLAS H. PARKER, *PAGE ON WILLS* § 49.11 (1962). Such a disclaimer would cause the wife's share to pass to other beneficiaries if there was a will—usually her children by the deceased—or increase her children's intestate share if there was no will. *Id.* § 49.12.

³¹⁶ *Id.* at § 49.11 to 49.12.

³¹⁷ In addition to the more devious scenarios described in the text for making collateral sources nonparties, the mother of the deceased's legitimate children may be a nonparty due to an earlier divorce. See *In re Estate of Rogers*, 583 A.2d 782, 783 (N.J. Super. Ct. App. Div. 1990).

³¹⁸ See *Sudwischer v. Estate of Hoffpauir*, 589 So.2d 474, 476 (La. 1991).

³¹⁹ *Id.* at 476.

³²⁰ *Sudwischer*, 589 So.2d at 476 (deceased's legitimate daughter ordered to submit); *Rogers*, 583 A.2d at 783 (deceased's ex-wife ordered to submit).

³²¹ See *Sudwischer*, 589 So.2d at 476.

record clearly demonstrates that avoiding a forced acknowledgment that a deceased relative fathered an illegitimate child is not a protected interest.³²²

The illegitimate child's interests in proving paternity weigh heavily against a collateral person's interest in not providing a blood sample for DNA testing.³²³ These interests include the rights to know who his or her father was, to share in the father's estate, and to establish eligibility to various government welfare and benefits programs.³²⁴ Where a paternity suit is brought to establish the right to state or federal benefits, the interests of the government in preventing fraud and ensuring equitable distribution of benefits are also weighed against the interests of collateral persons who seek to avoid testing. In a balancing of the rights of all parties, some courts have found that the interests of proving paternity clearly outweigh the collateral persons' interests in avoiding compelled testing.³²⁵

Moreover, future scientific developments will reduce the burden DNA testing places on collateral persons, shifting the balance further in favor of the illegitimate child. Today, most DNA-based paternity tests use blood samples.³²⁶ Methods exist and are being developed, however, to test fingernails, hair, urine and other sources, the collection of which is less invasive than the taking of a blood sample.³²⁷ Furthermore, state and federal agencies are compiling DNA databanks, increasing the likelihood that samples from the deceased or collateral parties will already be available.³²⁸ States concerned with providing samples for

³²² See, e.g., UNIFORM ACT ON PATERNITY § 2 (1960).

³²³ See *Sudwischer*, 589 So.2d at 476.

³²⁴ *Id.* at 475. There is little justification for testing third parties when the illegitimate child's interest is mere curiosity, rather than estate or government benefits. A recent, well publicized example of such a posthumous paternity claim is that of Henry Leon Ritzenhaler who was allegedly conceived by President Clinton's father, William Jefferson Blythe, on the day Blythe and Ritzenhaler's mother signed divorce papers. Tom Mashberg, *Man Who Would Be First Brother Put in Limelight*, BOSTON GLOBE, June 23, 1993, at 1. Ritzenhaler has said: "I just want to tell him [President Clinton] that he has a brother. . . . After that, a Christmas card once a year would be just fine." *Id.*

³²⁵ See, e.g., *Sudwischer*, 589 So.2d at 476. To avoid needlessly burdening collateral parties, plaintiffs may be required to make a preliminary showing that the deceased was his or her father, perhaps using a preponderance of the evidence standard, and that there is a need for DNA testing before a court orders blood tests. See *Rogers*, 583 So.2d at 785.

³²⁶ See CELLMARK DIAGNOSTICS, PATERNITY TESTING FACTS 2 (1988).

³²⁷ Telephone Interview with Jennifer Mihalovich, Forensic Science Associates (Jan. 22, 1993).

³²⁸ *Nova: Murder, Rape and DNA* (PBS television broadcast, Mar. 2, 1993). In addition to the Federal Bureau of Investigation's growing DNA database, at least 20 states have laws that require them to collect blood samples from people convicted of certain crimes so their DNA may be included in databases. *Id.*

paternity testing also could require a blood test whenever parents were granted a divorce, as well as requiring the test as a prerequisite to marriage, thereby expanding the number of samples available for future paternity actions. Thus, the privacy concerns of collateral parties whose DNA is needed for paternity determination are becoming even more de minimis due to the proliferation of sources and methods that do not require blood samples. As a result, the balance will shift further in favor of requiring that collateral persons submit to DNA testing in paternity determinations where the putative father is deceased.

C. Future Implications of DNA Technology

The increasing acceptance of DNA testing for posthumous determinations of paternity will not be without its problems. For example, it may lead to battles for control over existing DNA samples. The United States Department of Defense has created a repository of genetic information from all active American service members, and at least twenty states have legislation authorizing the creation of DNA databanks for convicted sex offenders.³²⁹ The Federal Bureau of Investigation and several police departments have also begun the creation of DNA data banks.³³⁰ Although these data banks are being created for forensic and criminal identification purposes, the samples they contain could easily be used in paternity determinations. Moreover, as the number of men and women whose DNA is stored in the various data banks increases, it may be possible to reconstruct DNA sequences of individuals based on stored samples from their relatives.³³¹ Absent clear legislative guidelines, litigation will likely result as illegitimate children seek to use these samples to prove paternity, while the database creators and the deceased's relatives argue that such a use is not authorized.

The power of DNA technology also will affect the privacy of all concerned. The privacy interests of the putative father's living relatives will be subsumed to the interests of illegitimate children in proving

³²⁹ *Id.* These samples will not be made available for criminal investigations or paternity cases, unless subpoenaed by court order. *U.S. to Keep Genetic Data on Military*, CHICAGO TRIB., Jan. 12, 1992, at 3. *Nova: Murder, Rape and DNA* (PBS television broadcast, Mar. 2, 1993).

³³⁰ E. Donald Shapiro & Michelle L. Weinberg, *DNA Data Banking: The Dangerous Erosion of Privacy*, 38 CLEV. ST. L. REV. 455, 474 & nn.97-98 (1990).

³³¹ See, e.g., *Tipps v. Metropolitan Life Ins. Co.*, 768 F. Supp. 577, 578 (S.D. Tex. 1991); *Sudwischer*, 589 So.2d at 475; CELLMARK, *supra* note 16, at 8. The increased availability of DNA samples in databanks may reduce the demands to exhume the bodies of putative fathers or to test collateral parties, while providing higher quality DNA samples for testing.

paternity.³³² Just as the living can be made parties to paternity actions in every state, so shall the dead. Fathers will go to their graves less secure in the belief that a refusal to acknowledge illegitimate offspring prevents illegitimate children from ever establishing paternity.³³³ The ability to litigate issues of paternity long after the putative father's death will greatly alter the expectations of privacy and finality that have been associated with one's death.³³⁴ Whatever actual rights to privacy a father of illegitimate children may enjoy are ended upon his death.³³⁵ Furthermore, his rights to privacy are not assignable, and cannot be maintained by other persons such as members of the individual's

³³² See, e.g., *Sudwischer*, 589 So.2d at 476 (legitimate daughter's privacy interest outweighed by emotional and financial interests of alleged illegitimate child).

³³³ As statutes and case law change, estate planners and attorneys will need to adapt their practices to the new realities of DNA testing technology. When advising a client who wishes to avoid a posthumous paternity claim, attorneys will need to discuss the extraordinary measures required to ensure that no DNA samples survive the deceased. These measures could include, among others, cremation, destruction of any blood banked in the client's name, destruction of biopsy and other tissue samples, and destruction of frozen embryos. See *supra* notes 114-15 for a discussion of sources of DNA other than the putative father's blood. See *Gerhardt v. Estate of Moore*, 441 N.W.2d 734, 740 (Wis. 1989) for a case in which cremation prevented a posthumous challenge to an admission of paternity made as part of a lump-sum support payment agreement. See Michelle F. Sublett, Note, *Frozen Embryos: What Are They and How Should the Law Treat Them*, 38 CLEV. ST. L. REV. 585 (1990) for a discussion of whether frozen embryos should be treated as life or as destructible property. The client may want to include a provision in his will instructing his administrator to seek destruction of any blood or tissue samples held by the coroner. See *In re Estate of Greenwood*, 587 A.2d 749, 750 (Pa. Super. Ct. 1991). The ethical considerations of advising a client to eliminate sources of genetic material to avoid a posthumous paternity claim are beyond the scope of this Note. Conversely, attorneys assisting clients in bringing paternity actions following the putative father's death need to consider a broad range of possible sample sources for DNA testing. See *supra* notes 114-15 for a discussion of alternate sources of genetic material. The increased likelihood of a posthumous paternity claim also may make non-probate instruments more attractive as a way of reducing the estate's size and, thereby, making such a suit less attractive. A recent example of how one attorney responded to the accuracy of DNA testing is the case of William Yacobozzi, Jr., who was sentenced to 180 days in jail and three years' probation after being found guilty of having an impostor take his place at a DNA test ordered as part of a paternity suit filed against him. Lily Dizon, *Yacobozzi Sentenced to Jail Term*, L.A. TIMES, Mar. 7, 1992, at B3. The State Bar of California also temporarily revoked his license because of the felony convictions for perjury, falsifying evidence and conspiring to obstruct justice. *Id.*

³³⁴ For example, a farmer's funeral was delayed when the coroner recalled the body for DNA tests and refused to release it for cremation following a claim that the deceased had fathered an illegitimate son 23 years earlier. Tanya Reed, *Farmer's Funeral Halted After Claim Over Paternity*, THE INDEPENDENT (LONDON), June 5, 1992, at 2. At stake was ownership of a farmhouse and 140 acres of grazing land which had been in the deceased's family for over 350 years. *Id.* A court in Lorain County ordered what was believed to be the first exhumation in Ohio for DNA testing to determine paternity. *Body to be Exhumed in Civil Case*, UPI, May 15, 1992, available in LEXIS, Nexis library, UPI File. At stake was an estate worth \$10,500 and the legitimacy of a teenage boy. *Id.*

³³⁵ 3 RESTATEMENT (SECOND) OF TORTS § 652I (1976).

family.³³⁶ One who fathers illegitimate children has no reasonable expectation that his actions will remain private after his death.

The final threat perceived from increased use of genetic testing is its ability to reveal intensely personal information about its subjects.³³⁷ DNA probes already have the capability to identify genetic defects including Huntington's Chorea, muscular dystrophy, Down's syndrome and sickle cell anemia.³³⁸ Because genetic traits are passed from parent to child, any revelation of the father's genetic predisposition to certain diseases or conditions could also reveal information about his blood relatives' genetic makeup. Although the probes currently used to create DNA fingerprints for paternity testing identify nothing related to the individuals' intelligence, sex, physical appearance, or even their species, as the sophistication of DNA probes and fingerprinting increases, steps will need to be taken to ensure that personal information is not revealed.³³⁹

The problems posed by an increasing acceptance of DNA testing for posthumous paternity determinations will occur even if courts and legislatures are hesitant to accept the new technology. The application of DNA technology to criminal, forensic and other investigations and the technology's potential to reveal intensely private information will amplify the privacy issues surrounding DNA databanks, regardless of whether it is used in paternity determinations. The trend toward increasing the right of illegitimate children to bring paternity actions, even after a putative father's death, is likely to continue, regardless of how rapidly states adapt their laws to reflect the promise of DNA technology. Courts will continue to face issues concerning the ordering, use and admissibility of DNA paternity tests, regardless of whether states change their laws. The problems surrounding the increased use of DNA testing for posthumous paternity determination are not avoidable, and are best met by direct legislative action.

D. *Proposed Changes to Uniform Acts*

State statutes governing paternity determination vary widely, especially for actions brought after the putative father's death.³⁴⁰ The mod-

³³⁶ *Id.*; see, e.g., *Swickard v. Wayne County Med. Examiner*, 475 N.W.2d 304, 309-10 (Mich. 1991).

³³⁷ See Longobardi, *supra* note 115, at 331-32.

³³⁸ *Id.*

³³⁹ *Id.* at 332, 338 n.97. It is impossible to distinguish a gorilla's DNA fingerprint from that of a human; they are both just a series of lines on an X-ray. *Id.* at 332 n.70.

³⁴⁰ See *supra* notes 43-44 and accompanying text for a discussion of different burdens of proof and other requirements for posthumous paternity actions.

ern trend is to allow posthumous actions, with proof by clear and convincing evidence.³⁴¹ Many current statutes, however, including the Uniform Parentage Act and Uniform Act on Paternity, were drafted before the development of DNA testing and do not reflect the technique's power and accuracy.³⁴² As a result, illegitimate children are often prevented from using the most probative, most clear and convincing evidence of paternity—DNA test results—by narrowly drawn statutes that are unreceptive to the new method.³⁴³ DNA tests allow an illegitimate child with substantial evidence of paternity to establish a higher level of proof and certainty; the tests may be the only way an illegitimate child whose father denied paternity can prove by clear and convincing evidence that a parent and child relationship existed.³⁴⁴ By recognizing the power of DNA testing, states will further the trend toward allowing reliable posthumous paternity determinations, proven by clear and convincing evidence, while endorsing the use of the most probative evidence available.³⁴⁵

As examples of the types of changes needed, this Note proposes modifications to two uniform acts. These proposed changes place DNA fingerprinting on the same footing as commonly used blood tests, including Human Leukocyte Antigen tests. They clearly resolve the issue of testing collateral parties in favor of the illegitimate child, while only allowing the court to order such testing after a showing that probative evidence is likely to result. Additionally, the changes recognize DNA databases as both an alternate source of genetic samples and as a way of reducing the incidence of compelled testing of the deceased's relatives. Finally, the changes recognize the potential of DNA technology to reveal personal information other than paternity by imposing a ban on testing that would expose this information.

³⁴¹ See, e.g., UNIFORM PARENTAGE ACT (1973); UNIFORM ACT ON PATERNITY (1960).

³⁴² The Uniform Parentage Act and Uniform Act on Paternity were drafted in 1973 and 1960, respectively. While both include provisions for blood tests, they are written with the presumption that the father is a living party to the action, and make no mention of DNA fingerprinting, that may be highly probative after the father's death, when there is no longer blood available for testing. See UNIFORM PARENTAGE ACT § 11 (1973); UNIFORM ACT ON PATERNITY § 7 (1960).

³⁴³ *Le Fevre v. Sullivan*, 785 F. Supp. 1402, 1407 (C.D. Cal. 1991) (DNA test results ignored due to statute's narrow requirements); *William M. v. Superior Court*, 275 Cal. Rptr. 103, 107 (Ct. App. 1990) (putative grandparents could not be ordered to submit to DNA tests); *In re Erbe*, 457 N.W.2d 867, 868–89 (S.D. 1990) (law made no provisions for posthumous paternity determination).

³⁴⁴ *In re Estate of Sanders*, 3 Cal. Rptr. 2d 536, 538, 545 (Ct. App. 1992) (alleged father never acknowledged paternity; use of DNA tests denied by statutory limits); *Batchelder v. Boyd*, 423 S.E.2d 810, 811–12 (N.C. Ct. App. 1992) (considerable evidence of paternity would be strengthened by DNA tests).

³⁴⁵ *Erbe*, 457 N.W.2d at 871–72 (Wuest, C.J., dissenting).

To facilitate the use of DNA testing in posthumous paternity actions, Section 11 of the Uniform Parentage Act, currently entitled "Blood Tests," should be changed as follows:³⁴⁶

§ 11. [Blood and DNA Tests]

(a) The court may, and upon request of a party shall, require the child, mother, or alleged father to submit to blood or DNA tests. The tests shall be performed by an expert qualified as an examiner of blood types or DNA fingerprints, appointed by the court.

(b) The court, upon reasonable request by a party, shall order that independent tests be performed by other experts qualified as examiner of blood types or DNA fingerprints.

(c) In all cases, the court shall determine the number and qualifications of the experts.

(d) If the alleged father is deceased, the court may order DNA testing of his body or other samples, or of blood relatives of the deceased, upon a showing that paternity may be established by the testing of such relatives. If genetic samples from the deceased or his blood relatives are stored in a DNA database, the court may order their release for testing, and shall do so before ordering the testing of the deceased's relatives. The results of these DNA tests shall be limited to the question of paternity and shall not reveal information about any party's physical characteristics, predisposition to certain medical conditions or other matters.

In addition, Section 7 of the Uniform Act on Paternity, currently entitled "Authority for Blood Tests," should be changed as follows:

§ 7. [Authority for Blood and DNA Tests]

The court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the [action][proceeding] made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood or other genetic tests. If the alleged father is deceased, the court may order DNA testing of his body or other samples, or of blood relatives of the deceased, upon

³⁴⁶ Underlined text indicates proposed additions to the existing uniform acts.

a showing that paternity may be established by the testing of such relatives. If genetic samples from the deceased or his blood relatives are stored in a DNA database, the court may order their release for testing, and shall do so before ordering the testing of the deceased's relatives. The results of these DNA tests shall be limited to the question of paternity and shall not reveal information about any party's physical characteristics, predisposition to certain medical conditions or other matters. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

States that adopted the 1990 version of the Uniform Probate Code, including the provision for parent and child relationships to be determined under the Uniform Parentage Act, would not need to make additional changes.³⁴⁷ Those that have adopted an earlier version including specific provisions for paternity determination, or have not adopted the reference to the Uniform Parentage Act, or have not adopted the Uniform Probate Code should change their statutes along the lines outlined above.³⁴⁸

Additionally, Congress should change federal statutes relating to the proof of paternity. In 1984, Congress responded to the improved ability of scientific testing to determine paternity and amended the Social Security Act to require that states pass laws providing for the establishment of paternity actions at any time prior to the child's eighteenth birthday to continue receiving Social Security benefits.³⁴⁹ Congress should respond to recent advances in paternity testing by explicitly providing for the use of DNA tests to determine paternity for all federal welfare and benefit programs, rather than relying on state law methods.³⁵⁰ States should respond to the accuracy of DNA testing by adopting the proposed changes where their statutes are based on the uniform acts, or by adopting similar language where the state has not adopted one of the uniform acts. The time has come for the law and the courts to recognize the accuracy of DNA testing in paternity

³⁴⁷ See UNIFORM PROBATE CODE § 2-114 (1990).

³⁴⁸ See, e.g., *id.* § 2-109 (1983).

³⁴⁹ Child Support Enforcement Amendments of 1984, 42 U.S.C. § 666(a)(5) (1988).

³⁵⁰ Issues surrounding the use of a paternity determination made pursuant to federal benefit laws to later establish rights under state succession or state benefit laws are outside the scope of this Note.

determination and to allow its use in paternity actions, before or after the putative father's death.³⁵¹

V. CONCLUSION

*No one who has ever thought at all about the relations of science and government, much less anyone who has experienced part of them directly, is likely to think that positive conclusions are going to be either firm or easy to come by.*³⁵²

DNA fingerprinting is changing the basic assumptions of paternity testing. The technique offers a degree of accuracy that reaches a near statistical certainty that one particular man is the father of a given illegitimate child. Moreover, highly accurate paternity testing is now possible even when the putative father is deceased.

As problems of proof and the risk of collusion become historical footnotes, the only remaining rationale for the denial of intestacy succession rights to illegitimate children is thus undercut. As a result, paternity litigation will shift from swearing matches and efforts to gather secondary evidence of acknowledgment to disputes over access to DNA samples from the deceased, and over whether the tests were performed correctly. DNA testing brings its own set of problems and invites litigation over these issues. The increasing number of illegitimate children in our society, and the expansion of state and federal benefit programs, provides a large pool of plaintiffs ready to litigate these issues.

Today, courts are struggling to respond in the face of a technology that obviates the last remaining justification for many of our intestate succession and benefit statutes. In so doing, they are coming to conflicting results. Some are using evidence codes or their own inherent power to compensate for legislative inaction; others are decrying illogical results and calling on the legislatures to act. It is time for our state and federal legislatures to ensure that our laws respond to the accuracy and efficiency of DNA tests in proving posthumous paternity. By acting promptly, they will take a major step toward fully and finally providing equal rights and equal protection to illegitimate children.

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³⁵¹ To the extent possible, Congress should require the states to allow the use of DNA testing in posthumous paternity actions. The federalism concerns surrounding a congressional mandate that states adopt certain standards for their estate laws are outside the scope of this Note, although one could argue that Congress has an interest in increasing the availability of estate benefits to illegitimate children as one way of reducing the children's need for federal benefits.

³⁵² C.P. SNOW, SCIENCE AND GOVERNMENT 3 (1961).